PROCEEDINGS AND ORDERS

CASE NBR: [91100577] CFX STATUS: [DECIDED]
SHORT TITLE: [Paschal, Bonita, et al.]
VERSUS [Didrickson, Dir., etc.] DATE DOCKETED: [100791]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Oct 7 1991	D	Petition for writ of certiorari filed.
2	Oct 7 1991		Appendix of petitioner filed.
4	Nov 4 1991		Order extending time to file response to petition until December 9, 1991.
5	Nov 4 1991		This extension is for all respondents.
6	Nov 7 1991		Waiver of right of respondent United States to respond filed.
8	Dec 9 1991	X	Brief of respondent State of Illinois in opposition filed.
7	Dec 11 1991		DISTRIBUTED. January 10, 1992
9	Dec 23 1991	X	Reply brief of petitioners Bonita Paschal, et al. filed.
11	Jan 13 1992		REDISTRIBUTED. January 17, 1992
13	Jan 21 1992		REDISTRIBUTED. January 24, 1992
14	Jan 27 1992		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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91-577

No.

Supreme Court, U.S.
FILED
OCT 7 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BONITA PASCHAL, DANIEL DODSON, PAUL BUCASAS and all others similarly situated,

Petitioners,

v.

LOLETA DIDRICKSON, the Director of the Illinois Department of Employment Security; STELLA CUTHBERT, the Commissioner of the Illinois Department of Employment Security; LYNN MARTIN, the Secretary of the United States Department of Labor; ROBERTS T. JONES, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case challenging the conduct of state officials as violative of the Due Process Clause of the Fourteenth Amendment to the United State Constitution, does the Eleventh Amendment to the United States Constitution bar a judgment for restitution of funds that would be fully paid by the federal government?

2. In a case challenging the conduct of state officials as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, does the Eleventh Amendment to the United States Constitution bar a judgment for restitution of funds that are segregated by law from the state's general revenues?

3. Should Hans v. Louisiana, 134 U.S. 1 (1890) and the reach of the Eleventh Amendment to the United States Constitution be confined to suits in which states or their officials are alleged to have violated state

law, thereby limiting the jurisdictional bar against such suits in federal court to state law claims but preserving a common law sovereign immunity defense for states and their officials against federal claims?

PARTIES TO THE PROCEEDINGS

A. Petitioners are:

1. Bonita Paschal, Daniel Dodson on their own behalf and on behalf of the certified plaintiff class they represent, defined as: "all persons who have made, are making or will make claims to the Illinois Department of Employment Security ("IDES") for federal supplemental compensation pursuant to Pub. L. 97-248 (as amended) and who have been, are being, or will be denied federal supplemental compensation by IDES on the ground that they have been unavailable for and/or failed actively to seek work", see Partial Settlement Order (App. 518)[1]; and

2. Paul Bucasas on his own behalf and on behalf of the certified plaintiff class he represents, defined as: "all persons who have made, are making or will make claims to IDES for extended benefits pursuant to the

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[1] We cite the separate appendix filed herewith as "App.".

Federal-State Extended Unemployment Compensation Act of 1970, 26 U.S.C. § 3304(a)(11), note Pub. L. 91-373, §§ 201-207 (as amended), and who have been, are being or will be denied extended benefits by IDES on the ground that they have been unavailable for and/or failed actively to seek work," see Partial Settlement Order (App. 518).[2]

B. Respondents are:

1. The Director of IDES in her official capacity, a position now occupied by Loleta Didrickson; the Commissioner of IDES in her official capacity, a position now occupied by Stella Cuthbert; and

2. The Secretary of the United States Department of Labor, in her official capacity, a position now occupied by Lynn Martin; the Assistant Secretary for the Employment and Training Division of the United States Department of Labor, a position now occupied by Roberts T. Jones; and the United States Department of Labor.[3]

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[2] We refer to Bonita Paschal, Daniel Dodson and the class of persons who applied for FSC benefits as the "FSC claimants;" Paul Bucasas and the class of persons who applied for EB as the "EB claimants;" and all three of the named plaintiffs and the members of both classes as the "claimants."

[3] We refer to the Director and the Commissioner of the Illinois Department of Employment Security as "IDES;" and the Secretary of the United States Department of Labor, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor, and the United States Department of Labor as "USDOL."

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No.

IN THE

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Bonita Paschal, Daniel Dodson, Paul Bucasas and all others similarly situated,

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Loleta Didrickson, the Director of the Illinois Department of Employment Security; **Stella Cuthbert**, the Commissioner of the Illinois Department of Employment Security; **Lynn Martin**, the Secretary of the United States Department of Labor; **Roberts T. Jones**, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and **the United States Department of Labor**,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Bonita Paschal, Daniel Dodson and Paul Bucasas, on behalf of themselves and the plaintiff classes they represent, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Petitioners seek review of the court of appeals' judgment and opinion below holding that restitution of unemployment insurance benefits that the petitioners lost because of IDES's unconstitutional conduct is barred by the Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI. That judgment and opinion (App. 1) is reported at 936 F.2d 940. The court of appeal's earlier opinion on the merits of the petitioners' claims (App. 38) - as to which petitioners do not seek review here - is reported at 843 F.2d 967. The opinion of the district court on the Eleventh Amendment issue (App. 24), which was affirmed by the court of appeals, is reported at 741 F. Supp. 740. The district court's opinion on the merits of the petitioners' claims (App. 133), which was reversed, in part, by the court of appeals is reported at 625 F. Supp. 619.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1991. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Article III, Section 2 of the United States Constitution provides, in relevant part, that:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... to Controversies ... between a State and Citizens of another State; ... and between a State ... and foreign States, Citizens or Subjects.

II. The Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, provides, in relevant part, that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws

of any State to the Contrary notwithstanding.

III. The Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

IV. 28 U.S.C. § 1331 provides that:

> The district courts shall have original jurisdiction of all civil actions ... aris[ing] under the Constitution, laws, or treaties of the United States.

V. The full texts of the other statutory provisions involved in this case are voluminous and, therefore, are included in a separate appendix. Those provisions are: The Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3304 (1988 and Supp. I 1989); The Federal-State Extended Unemployment Compensation Act of 1970, 26 U.S.C. § 3304 (1988), note Pub. L. 91-373, §§ 201-207 (as amended); The Federal Supplemental

Compensation Act of 1982, 26 U.S.C. § 3304 (1988), note Pub. L. 97-248, §§ 601-606 (as amended); The Social Security Act, §§ 301-303, 42 U.S.C. §§ 501-503 (1988); The Social Security Act, §§ 901-905, 42 U.S.C. §§ 1101-1105 (1988); The Illinois Unemployment Insurance Act, §§ 403.B., 409., 2100., 2101., 2103. and 2900., Ill. Rev. Stat. ch. 48, ¶¶ 403.B., 409., 660., 661., 663., 790. (1990).

STATEMENT OF THE CASE

I. THE STATUTORY FRAMEWORK

A. The Two Unemployment Insurance Programs At Issue

This case concerns two types of unemployment insurance benefits. The first is extended benefits ("EB"). See The Federal-State Extended Unemployment Compensation Act of 1970 ("EUCA"), 26 U.S.C. § 3304, note Pub. L. 91-373, §§ 201-207 (as amended) (App. 289-315); Section 409 of the Illinois Unemployment Compensation Act ("IUIA"), Ill. Rev. Stat.

ch. 48, ¶ 409. (App. 472). The second is federal supplemental compensation ("FSC") benefits. See The Federal Supplemental Compensation Act of 1982 ("FSC Act"), 26 U.S.C. § 3304, note Pub. L. 97-248, §§ 601-606 (as amended) (App. 318-341).

Unemployment insurance is "a cooperative federal-state program of benefits to unemployed workers." St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 775 (1981). In Illinois, claimants can receive a maximum of 26 weeks of regular benefits. Ill. Rev. Stat. ch. 48, ¶ 403.B. (App. 471). During sufficiently severe recessions, however, EUCA provides up to 13 additional weeks of EB to individuals who have exhausted their rights to receive regular benefits. EUCA, § 202(a)(1), (b)(1) (App. 289,299); Ill. Rev. Stat. ch. 48, ¶¶ 409.C., F. (App. 478, 483). EB are only available in a state when it is experiencing a recession severe enough to trigger an "indicator" that

switches EB "on" in that state. EUCA, § 203(a)(1), (c), (d)(1) (App. 302, 303-304); Ill. Rev. Stat. ch. 48, ¶ 409.A.1., 2. (App. 472-473). Conversely, when economic conditions in a state reach a point prescribed by EUCA, EB switches "off." EUCA, § 203(a)(2), (d)(2) (App. 302, 304-305); Ill. Rev. Stat. ch. 48, ¶ 409.A.1., 3. (App. 472, 473-474). EB has not been "on" in Illinois since June, 1983.

The FSC program was a temporary program that provided additional weeks of unemployment insurance for individuals who had exhausted both regular benefits and any EB that they were entitled to receive. See FSC Act, § 602(b)(1) (App. 318-319). Except to exhaust pending claims, FSC benefits have not been payable for any week beginning after March 31, 1985. FSC Act, § 602(f)(2) (App. 334-335).

B. The Funding Of Unemployment Insurance Benefits

The first two questions presented for review ask whether the Eleventh Amendment to the United States Constitution bars a federal court from ordering restitution of EB and FSC benefits even though such relief would not "come from the general revenues of the State of Illinois." Edelman v. Jordan, 415 U.S. 651, 665 (1974). FSC benefits are funded entirely by the federal government. For each state that entered into an agreement to participate in the FSC program, the federal government advanced or reimbursed 100 percent of the FSC paid to individuals by the state. FSC Act, §§ 603(a), 604 (App. 336,338). In addition, the FSC Act authorized funds to be appropriated "for purposes of assisting the States ... in meeting the costs of the administration of ... [the FSC program]." FSC Act, § 604(c) (App. 339-440); see 42 U.S.C. § 1101(c)(1)(A)(i) (App. 429-430).

One half of EB are also reimbursed from the federal treasury. See EUCA, § 204 (App. 306).[4] Like all of regular unemployment insurance benefits, the other half of EB are paid from the unemployment trust fund. 42 U.S.C. § 1104 (App. 457); 26 U.S.C. § 3304(a)(3) (App. 266-267); see California v. Java, 402 U.S. 121, 126 (1971). But even the money in the unemployment trust fund is not the state's money.

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[4] The federal government also assists the states in meeting their costs of administering the EB program. See 42 U.S.C. §§ 501, 502, 1101(c)(1)(A)(i), 1103(c)(2), Ill. Rev. Stat. ch. 48, ¶ 663. (App. 399, 429-430, 453, 512). If federal money is insufficient to cover administrative costs for any of IDES's unemployment insurance programs, additional funds are available to IDES in its "special administrative account" which is comprised of interest and penalties collected from employers who fail to make timely contributions. Ill. Rev. Stat. ch. 48, ¶ 661. (App. 506). Like all of the money used in the state's unemployment insurance program, the federal funds for administering the program and the funds in the special administrative account are kept "separate and apart from all other State moneys." Id. at ¶ 663. (App. 512).

The trust fund is financed by a federal excise tax paid by the nation's employers based on the total wages each paid to its employees. Federal Unemployment Insurance Tax Act ("FUTA"), 26 U.S.C. § 3301 (App. 216); St. Martin, 451 U.S. at 775 n. 3. Employers do not normally pay their whole FUTA tax, however, because those who pay contributions to a state unemployment insurance program that complies with federal law[5] enjoy a credit against their federal unemployment tax obligations. 26 U.S.C. §§ 3302, 3303 (App. 216, 249). Under the federal law, the contributions collected by IDES are immediately turned over to the federal government.[6] 26 U.S.C. § 3304(a)(3) (App.

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[5] The Secretary of Labor certifies whether each state has complied with FUTA. 26 U.S.C. § 3304 (App. 266). See 42 U.S.C. §§ 502, 503 (App. 399, 401).

[6] A detailed description of the accounts used to transfer contributions to and from IDES and the federal unemployment trust fund is described in the court of appeals' opinion (App. 7-13).

266-267); 42 U.S.C. § 503(a)(4) (App. 402); Ill. Rev. Stat. ch. 48, ¶ 660. (App. 494). And, though they are then credited to Illinois' account in the unemployment trust fund, IDES may requisition them "solely for the payment of benefits" or related expenses. 26 U.S.C. § 3304(a)(4) (App. 267); 42 U.S.C. § 503(a)(5) (App. 402-404); Ill. Rev. Stat. ch. 48, ¶ 660. (App. 494). Moreover, to assure that employers in Illinois receive FUTA credit, IDES must comply with all federal requirements governing the unemployment insurance programs. 42 U.S.C. §§ 501, 503(a) (App. 399, 401-406); 26 U.S.C. §§ 3302(c)(3), 3304(c) (App. 225-227, 284-286). Thus, Illinois merely acts as the federal government's agent for collecting and dispersing part of the revenues necessary to operate the country's unemployment insurance program.

Even if the money in the federal unemployment trust fund could properly be

characterized as Illinois' money, it is not the state's general revenues. All money used by IDES for payment of benefits or for administration of its unemployment insurance program must be kept "separate and apart from all public moneys or funds of th[e] State." Ill. Rev. Stat. ch. 48, ¶¶ 660.A., 663. (App. 495-96, 513); see id. ¶ 660.A. (App. 500, 502). And Illinois assures both that the money in the accounts that it uses to fund its unemployment insurance program "shall not be commingled with other State funds," id. at ¶ 660.A. (App. 502), and that those accounts are "administered by the Director [of IDES] exclusively for the purposes of ... [the IUIA]." Id. at App. 496. Moreover, the state's general revenues could never be used to pay unemployment insurance benefits because "[t]he monies payable under [the IUIA] ... shall be the sole and exclusive source for the payment of benefits payable under [that Act]." Id. at ¶ 790. (App. 517).

Accordingly, the Illinois Supreme Court has repeatedly "reject[ed] th[e] argument ... that the enforced contributions made under the [IUIA] should be recognized as a [state] tax rather than an insurance program." Garland v. Department of Labor, 104 Ill. 2d 383, 390-92, 472 N.E.2d 434, 437 (1984) (collecting authorities).

II. THE PETITIONERS' CLAIMS AND THE DISPOSITION OF THE CASE BELOW

Petitioners are Illinois citizens who represent two classes of unemployment insurance claimants: those who filed claims for EB with IDES, and those who filed claims for FSC with IDES. The petitioners brought this case pursuant to 42 U.S.C. § 1983 to challenge policies and practices that IDES used to determine whether EB and FSC claimants had "actively engaged in seeking work" as required by both EUCA, § 202(a)(3)(A)(ii), (E) (App. 296), and the FSC Act, § 602(d)(2)

(App. 321). As relevant here, the petitioners claimed that IDES violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, sec. 1, cl. 3, and the "fair hearing" clause of Section 303(a)(3) of the Social Security Act[7], 42 U.S.C. § 503(a)(3) (App. 403).

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[7] The "fair hearing" clause requires that state unemployment insurance statutes provide an "[o]pportunity for fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3) (App. 402). Like other federal courts, the Seventh Circuit in this case treated the "fair hearing" requirement as one "tested by the same standards as constitutional due process." App. 98 (quoting Camacho v. Bowling, 562 F. Supp. 1012, 1020 (N. D. Ill. 1983) (citing Ross v. Horn, 598 F.2d 1312, 1318 n.4 (3d Cir. 1979)). This appeal raises questions about the relief available for violations of the fair hearing and due process provisions, but it does not present any question about whether those two provisions are tested by the same standards. For convenience, therefore, we use the term "due process" to mean both the statutory fair hearing requirement and the constitutional due process requirement.

The petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1337, 1343(3). In the earlier appeal, the court of appeals affirmed the district court's holding that it had jurisdiction over the dispute under 28 U.S.C. § 1331. App. 68-74.

After the district judge dismissed the case under Fed. R. Civ. P. 41(b), App. 133-215, the court of appeals reversed, in part, holding that petitioners had presented sufficient evidence to prove that IDES had violated the claimants' due process rights by giving them inadequate notice of their work search responsibilities and of the issues to be raised at the hearings at which the claimants' compliance with the work search requirements were adjudicated. App. 99-116. "Because the district court terminated the trial after the plaintiffs presented their case, [the court of appeals] remand[ed] to give the defendants an opportunity to rebut

the plaintiffs' evidence...." Id. at App. 115.

The case was not retried, however. Instead, the parties entered into a Partial Settlement Order. App. 518-22. The settlement is "partial" in that it provides only prospective relief and only for the EB claimants. App. 525-529. No prospective relief was provided to the FSC claimants, because FSC was paid pursuant to a temporary program that has ended. FSC Act, § 602(f)(2) (App. 334-335). And even the prospective relief for the EB program is contingent because the EB program lies dormant until the program is triggered "on" by adverse economic conditions. See EUCA, § 203(d) (App. 303-305).

The Partial Settlement Order also provided, however, that the parties would litigate questions regarding petitioners' remaining claims for retroactive relief. App.

530-531.[8] After the district judge approved the settlement, IDES moved to dismiss those claims on the ground that the Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, deprives a federal court of the jurisdiction to award the claimants retroactive relief. The district court granted IDES's motion holding that the case was controlled by Edelman v. Jordan, 415 U.S. 651 (1974) even though a judgment for unemployment insurance benefits would not affect the state's general revenues and, at least as to FSC benefits, a judgment would be wholly paid by the federal government. App. 24-37. The district judge reasoned that since "[r]etroactive relief would bind the state in its role as the sovereign," it did

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[8] Specifically, petitioners sought "a declaratory judgment, payment of lost EB and FSC benefits, re-adjudication of their claims to EB and/or FSC, notice relief, and/or such other retroactive relief as the [District] Court would allow." Partial Settlement Order ¶ IV.A.2. (App. 530-531).

not matter "[t]hat Illinois could recoup the outlay from someone else...." Id at App. 32.

The district court "enter[ed] a final judgment approving the [partial] consent decree and otherwise dismissing the complaint on the basis of the eleventh amendment." Id. at App. 37. On petitioners' appeal, the court of appeals affirmed. Id at App. 22-23. The case, therefore, comes to this Court from a final order.

The court of appeals rejected the teaching of what it characterized as "admittedly ample authority that recognizes that a lawsuit is not against the sovereign when the relief has no impact upon the state itself." App. 15. Instead, the court of appeals "prefer[red] an approach that disregards the source of state funds" because, it said, to consider the source of the funds, "forces courts ... to determine whether the

defendant department or subdivision is indeed 'the state.'" Id. at App. 18.

The court of appeals acknowledged not only that the federal treasury pays for all of FSC and one half of EB, id. at App. 11-12, but also that, since the other half of EB is financed from the unemployment trust fund, all of EB is "financed entirely with federal funds." Id. at App. 6. The court of appeals also acknowledged that the federal government assists states in paying the costs of administering those programs. Id. at App. 12-13. Furthermore, since the federal government has waived its sovereign immunity against suits for such expenses, it is amenable to suits by states seeking reimbursement of these funds. Bowen v. Massachusetts, 487 U.S. 879 (1988). Nonetheless, the court of appeals held that "[i]n an era of mandatory budget reduction and rising unemployment rates, there is no guarantee that the federal government will

continue to be 'Johnny-on-the-spot' with ready cash in hand." App. 19.

The court of appeals relied on this Court's decisions in Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946) and Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944), which concerned state tax revenue destined for the states' general revenues but separated from them while a dispute concerning the assessments was resolved. App. 19-20; see Kennecott Copper, 327 U.S. at 576; Great Northern Life Ins. Co., 322 U.S. at 53. In contrast, the funds segregated for payment of unemployment insurance in Illinois are "the sole and exclusive source for the payment of [unemployment insurance] benefits." Ill. Rev. Stat. ch. 48, ¶ 790. (App. 517). Therefore, while judgments against the states in the cited cases would have diminished their general revenues, a judgment ordering payment of unemployment insurance benefits from IDES could never affect Illinois' general revenues.

The court of appeals acknowledged that this Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) "recognizes a need to balance the supremacy of federal law against the constitutional immunity of the states." App. 21. It also acknowledged, implicitly, that, since the EB program will trigger "on" again only if economic conditions in Illinois deteriorate substantially and the FSC program is now defunct, restitution of EB is the principle, and restitution of FSC is the only means by which the individuals in the two respective groups can vindicate their federal rights. Id. at App. 21.

The court of appeals characterized "[t]he question [it was] asked to resolve ... [as] whether the accrued unemployment compensation benefits sought here will have to be paid out of [the general revenues of the state]." Id. App. 5-6. The court of appeals then acknowledged that restitution of EB and FSC

would not "inevitably come from the general revenues of the State of Illinois," Edelman, 415 U.S. at 665, or indeed, from the state's revenues at all. App. 11-14. Nonetheless, it held that the claimants' interest in "seeking vindication of their federal rights through a retroactive damage award ... is insufficient to override the command of the eleventh amendment." Id. at App. 22.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH TWO LINES OF DECISIONS IN OTHER CIRCUITS

This case presents this Court with an opportunity to resolve two conflicts among the courts of appeal as to the scope of the immunity state officials enjoy under the Eleventh Amendment to the United States Constitution.

A. The circuits are split as to whether judgments for those public benefits which are fully funded by the federal government but

paid through programs administered by the states, are barred by the Eleventh Amendment. The First, Third, Tenth and the D.C. Circuits hold that "retroactive relief [is available] against [a state agency] at least to the extent that [the agency] will be reimbursed by the United States." Bennett v. White, 865 F.2d 1395, 1408 (3d Cir. 1989), cert. denied, 492 U.S. 920 (1989). Accord, Foggs v. Block, 722 F.2d 933, 941 n.6 (1st Cir. 1983), rev'd on other grounds sub nom., Atkins v. Parker, 472 U.S. 115 (1985); Klaips v. Bergland, 715 F.2d 477, 484 (10th Cir. 1983); Bermudez v. United States Department of Agriculture, 490 F.2d 718 (D.C. 1973), cert. denied, 414 U.S. 1104 (1973); Carter v. Butz, 479 F.2d 1084 (3d Cir. 1973), cert. denied, 414 U.S. 1094, 1103 (1973). With the decision below, however, the Seventh Circuit joined the Second and Sixth Circuits in holding that, in a suit against a state official, any judgment for recovery of money, even for benefits that are

fully funded by the federal government, is barred by the Eleventh Amendment. Cotton v. Mansour, 863 F.2d 1241, 1245-47 (6th Cir. 1988), cert. denied, 110 S. Ct. 835 (1990); Colbeth v. Wilson, 554 F. Supp. 539, 544 (D. Vt. 1982), aff'd Colbeth v. O'Rourke, 707 F.2d 57 (2d Cir. 1983) (per curiam).

B. The circuits are also split as to whether judgments payable from funds that are segregated by law from a state's general revenues - which include not only the unemployment trust fund, but other segregated funds as well - are barred by the Eleventh Amendment. Thus, the Fourth Circuit has upheld a judgment payable from the unemployment trust fund. Brown v. Porcher, 660 F.2d 1001, 1006-1007 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), disapproved on other grounds by, Wimberly v. Labor and Industrial Relations Commission of Missouri, 479 U.S. 511 (1987). Similarly, the Fourth, Fifth and Eighth Circuits have

held that the Eleventh Amendment does not bar monetary relief from state funds that are segregated by law from the state's general revenues. Almond v. Boyles, 612 F. Supp. 223, 227-8 (D.C. N.C. 1985) (a judgment payable from the North Carolina State Retirement System not barred by the Eleventh Amendment), aff'd, 792 F.2d 451, 456 (4th Cir. 1986), cert. denied, 479 U.S. 1091 (1987); American Re-Insurance Co. v. Janklow, 676 F.2d 1177, 1184-85 (8th Cir. 1982) (remanded to determine whether a fund created to pay leases was sufficiently segregated from the state's general revenues that an award from the fund would not be barred by the Eleventh Amendment); Schiff v. Williams, 519 F.2d 257, 262 (5th Cir. 1975) (an award from a fund composed of solely of student activities fees collected at a state university not barred by the Eleventh Amendment). And the Third Circuit has held that whether funds are segregated from the state's general revenues

is the "most important factor" in determining whether a judgment for monetary relief in a suit against state officials is barred by the Eleventh Amendment. Blake v. Kline, 612 F.2d 718, 723-24 (3d Cir. 1979) (remanded to determine whether a judgment against funds held to pay pensions by the Public School Retirement Board of Pennsylvania is barred by the Eleventh Amendment), cert. denied, 447 U.S. 921 (1980).

In contrast, in addition to the Seventh Circuit's decision below, the Tenth and Eleventh Circuits hold that the Eleventh Amendment bars a judgment in federal court for unemployment insurance benefits.[9] Esparza

[9] Prior to the ruling below, the Seventh Circuit had upheld judgments payable from both the unemployment trust fund, Jenkins v. Bowling, 691 F.2d 1225, 1235 (7th Cir. 1982), aff'g in relevant part, 80 C 928 (N.D. Ill. 1982), and from the Illinois Toll Highway Trust Fund, which is also segregated from the state's general revenues. Miller-Davis v. Illinois State Toll Highway Authority, 567 F.2d 323 (7th Cir. 1977). Thus, although the court of appeals did not expressly say so, (continued...)

v. Valdez, 862 F.2d 788, 794 (10th Cir. 1988), cert. denied, 492 U.S. 905 (1989); Fincher v. State of Florida Department of Labor, 798 F.2d 1371, 1372 (11th Cir. 1986), cert. denied, 479 U.S. 1072 (1987).

II. THE SEVENTH CIRCUIT'S RULING DECIDES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The court of appeals held that the source of the funds from which a judgment would be paid is irrelevant to whether the judgment is barred by the Eleventh Amendment. App. 17-18. Thus, under the court of appeals' analysis, that the defendants are state officials is decisive as to whether monetary relief is barred by the Eleventh Amendment even if neither the state nor its officials

[9](...continued)
its decision below can only be understood as overruling the Eleventh Amendment holdings in those decisions. See App. 14-18.

will actually pay the judgment. Id. at App. 18.

This Court's decisions, however, belie this "case caption" understanding of the Eleventh Amendment and confirm that, contrary to the decision below, the source of the funds from which a judgment would be paid is the decisive factor in determining whether a judgment for money is barred by the amendment. For instance, this Court has repeatedly held that whether a federal court can enter a judgment payable by a municipality depends on whether the state's general revenues are the source of the funds from which the judgment would be paid. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 123 n. 34 (1984) (collecting authorities); compare Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280 (1977) (Eleventh Amendment does not bar judgment against municipal corporation when funds would not be paid from the state's general revenues)

with Edelman v. Jordan, 415 U.S. 651 (1974) (Eleventh Amendment bars a judgment for welfare benefits against not just state, but also county officials since the benefits are paid from the state's general revenues).

Similarly, this Court has held that judgments against interstate agencies are not barred by the Eleventh Amendment if, "instead of the state treasury being directly responsible for judgments against [the interstate agency], [the relevant state statute] expressly provides that the obligation of [the agency] shall not be binding on either state." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401-402 (1979) (emphasis in original); see Port Authority Trans-Hudson Corporation v. Feeny, 110 S.Ct. 1868, 1878-80 (1990) (Brennan, J., concurring) (A judgment against an interstate agency whose liabilities are not paid from the states' general revenues is not against "one of the United States"

within the meaning of the Eleventh Amendment).[10] See also, Fitzpatrick v. Bitzer, 427 U.S. 445, 459-60 (1976) (Stevens, J., concurring) (Edelman does not restrict a federal court's "power to enter a judgment payable immediately out of trust assets ... [but instead is] limited to the situation in which the award is payable directly from state funds...."); cf., Missouri v. Jenkins, 491 U.S. 274, 290 (1989) (O'Conner, J., dissenting in part) ("The Eleventh Amendment does not, of course, provide a State with across-the-board immunity from all monetary relief.").

Furthermore, with regard to whether federal funding for the benefits at issue

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[10] The unemployment insurance program is, in essence, an interstate compact, see U.S. CONST. art. I. sec. 10, since FUTA requires that a state's unemployment insurance statute provide that "compensation shall not be denied or reduced to an individual solely because he files a claim in another State ... or because he resides in another State ... at the time he files a claim for unemployment compensation." 26 U.S.C. § 3304(a)(9)(A) (App. 276).

removes the bar of the Eleventh Amendment, at least one district court, after observing that this Court did not question its jurisdiction to consider the merits of the claim in Atkins v. Parker, 472 U.S. 115 (1985), treated that decision as "implicit authority for a federal court's power to consider the merits of claims for all forms of requested relief [in cases against state officials involving benefits fully financed by federal funds]." Griffen v. Coler, 667 F. Supp. 1233, 1242, 1239-42 (C.D. Ill. 1986). If that understanding of Atkins is correct, then the decision below conflicts with this Court's decision in Atkins, too. And, if Griffen's understanding of Atkins is incorrect, then Griffen demonstrates that this Court's Eleventh Amendment rulings leave the lower federal courts uncertain as to whether the Eleventh Amendment bars relief against state officials that will be paid wholly from federal funds. See Section I.A., supra.

III. HANS v. LOUISIANA SHOULD BE CONFINED TO CASES IN WHICH STATES ARE ALLEGED TO HAVE VIOLATED STATE LAW BECAUSE THE PLAINTIFF IN HANS IN FACT PRESENTED ONLY A STATE LAW CLAIM, AND BECAUSE THAT READING OF HANS WOULD VINDICATE THE SUPREMACY OF FEDERAL LAW AND CURE THE INCOHERENCY THAT NOW ATTENDS SOVEREIGN IMMUNITY JURISPRUDENCE

The text of the Eleventh Amendment prohibits federal courts from asserting jurisdiction in "suit[s] ... prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The amendment would, therefore, appear to bar federal jurisdiction only in suits based on a claim that the state defendant violated state law. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 262 (1985) (Brennan, J., dissenting) ("A plaintiff seeking federal jurisdiction against a State under the state-citizen or state-alien diversity clauses would be asserting a cause of action based on state law, since a federal question ... claim would provide an

independent basis for jurisdiction that did not depend on the identity of the parties.").

This is a case in which citizens of Illinois claim that Illinois officials violated federal law. Accordingly, the text of the Eleventh Amendment does not appear to bar restitution regardless of whether the benefits petitioners seek are paid from the state's general revenues. Nonetheless, if restitution would come from Illinois' general revenues, the Eleventh Amendment would bar a federal court from hearing petitioners' claim. Edelman v. Jordan, 415 U.S. 651 (1974). That is so because, "[d]espite the narrowness of its terms, since Hans v. Louisiana, 134 U.S. 1 (1890), [this Court] ha[s] understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial

authority in Article III is limited by this sovereignty." Blatchford v. Native Village, 111 S.Ct. 2578, 2581 (1991). Put differently, as Hans and its progeny are currently interpreted, states are immunized from judgments for monetary relief "even [in] federal claims that otherwise would be within the jurisdiction of the federal courts." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 120 (1984).

The third question presented asks this Court to hold that: (a) Hans is not properly read to bar federal jurisdiction over claims for monetary relief against state officials for violations of federal law; and that (b) consistently, while the Eleventh Amendment establishes that state officials enjoy a constitutional immunity that bars federal jurisdiction in state law claims, those officials retain only a common law sovereign immunity defense against federal law claims. Thus, aside from this Court's resolution of

the other questions presented for review, under the reading of Hans that we urge, the court of appeals' conclusion that the Constitution barred it from hearing petitioners' claims would be erroneous, since petitioners present claims for violations of federal, not state law.

Petitioners recognize that this Court has reconsidered Hans in four recent cases. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989); Welch v. Texas State Dep't. of Highways & Public Transportation, 483 U.S. 468 (1987); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). But plaintiffs in those cases sought to have Hans overruled. In contrast, as explained more fully below, petitioners submit that not only Hans itself, but also much of its progeny, were correctly decided since Hans and many of the cases decided under its authority are properly understood to have concerned state law claims

over which the Eleventh Amendment does bar federal jurisdiction.

Moreover, had this Court overruled Hans in any one of those four recent cases, the result would have been to confine the reach of the Eleventh Amendment to its literal terms, i.e. to diversity cases. In contrast, the petitioners' position is that the amendment bars federal jurisdiction in all state law claims against states or their officials, regardless of the jurisdictional basis on which such claims would otherwise be heard in federal court. See, e.g, 28 U.S.C. § 1367 (supplemental jurisdiction over state claims). Finally, under petitioners' theory, though the Eleventh Amendment would be confined to state law claims, the states would retain their common law immunity, thereby meeting some, though concededly not all, of the concerns animating the current rule that the states enjoy a constitutional

immunity that bars federal jurisdiction in federal claims for monetary relief.

The reasons for reconsidering whether Hans and the Eleventh Amendment should be read to bar a federal court from asserting jurisdiction over federal claims against state officials, and for doing so in this case, are compelling:

A. Although the plaintiff in Hans invoked the federal court's jurisdiction because the case arose under federal law within the meaning of Article III of the Constitution, he actually presented only a state law claim. Specifically, Hans concerned a state law contract claim in which a federal question arose only in reply to the state's defense, i.e., that the state provision purporting to repudiate the debt violated the Contracts Clause of the Constitution. 134 U.S. at 10, 15; see Burnham, Taming the Eleventh Amendment Without Overruling Hans

v. Louisiana, 40 Case W. Res. L.Rev. 931, 948-55, 977-80 (1990).

Hans, however, was decided in 1890. Eighteen years later, in Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908), this Court first held that, unlike the "arising under" language in Article III, that same language in the statute creating federal-question jurisdiction (now 28 U.S.C. § 1331) only provides for federal jurisdiction over cases in which "the federal question ... appear[s] on the face of a well-pleaded complaint and ... [did] not enter in anticipation of a defense." Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983) (citing, inter alia, Mottley, 211 U.S. at 149). Prior to Mottley, however, and thus when Hans was decided, the Court treated a state law claim in which the plaintiff alleged that a defense was unconstitutional as a case "arising under" federal law within the meaning

of the federal-question statute. See Hans, 134 U.S. at 10, 15.

This Court has correctly held that the Eleventh Amendment bars federal jurisdiction in any suit in which the plaintiff alleges that a state or its officials violated state law even if the plaintiff seeks to invoke federal jurisdiction on a basis other than diversity of the parties. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). Pennhurst is premised on an appreciation that there is no "greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." Id. at 106. Yet if the amendment was construed to extend only to diversity cases, any plaintiff with a state law claim who could find a basis other than diversity for invoking federal jurisdiction could circumvent "the

principles of federalism that underlie the Eleventh Amendment." Id.[11]

The Constitution's treatment of federal jurisdiction over state law claims like the one in Hans, where the Court properly held that the suit was barred by the Eleventh Amendment, is to be contrasted with its treatment of claims for violation of federal law. The Constitution gives Congress the power to allow federal courts to hear federal-question claims. U.S. CONST. art. III, sec. 2. And Congress has exercised that option to permit federal courts to hear claims for violations of federal law. 28 U.S.C. § 1331;

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[11] Indeed, although the Eleventh Amendment was enacted to overrule Chisholm v. Georgia, 2 Dall. 418 (1793), before Mottley, any interpretation of the Eleventh Amendment that did not bar federal jurisdiction in all state law claims would have permitted federal courts to hear suits indistinguishable from Chisholm since any plaintiff in Chisholm's position could, like Hans, have urged that the state's refusal to pay its debt violated the Contracts Clause and, thus, that the case arose under the Constitution.

see Verlinden B. V., 461 U.S. at 494; Mottley, 211 U.S. 149.

Moreover, while the Eleventh Amendment confirms that a federal court cannot "instruct[] state officials on how to conform their conduct to state law," Pennhurst, 465 U.S. at 106, the Supremacy Clause confirms that "[not]hing in the Constitution and Laws of any State," including a state's sovereign immunity doctrine, can limit a federal court from providing effective remedies for a state official's violation of the "Constitution and the Laws of the United States" since those are "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Therefore, that part of the Court's Eleventh Amendment doctrine that extends the amendment's jurisdictional bar to claims for violation of federal law "is inconsistent with the essential function of the federal courts - to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the

land...." Atascadero, 473 U.S. at 255-7 (Brennan, J., dissenting).

B. Reading Hans as holding that the Constitution bars claims for violation of federal law not only undermines the Supremacy Clause, it results in substantial inscoherence in the constitutional jurisprudence of sovereign immunity. See Union Gas Co., 491 U.S. at 25 (Stevens, J. concurring) (describing Hans as having "departed from the plain language, purpose and history of the Eleventh Amendment," and relating that departure to the "Court's inability to develop a coherent doctrine of Eleventh Amendment immunity...."); Welch, 483 U.S. at 519 & n. 19 (Brennan, J., dissenting) ("progeny of Hans has produced erratic and irrational results.").

This incoherency can be understood by juxtaposing two sets of this Court's rulings. One set proclaims that the United States Constitution bars federal courts from

asserting jurisdiction over federal claims against states. See Blatchford, 111 S. Ct. at 2581 (judicial authority of federal courts under Article III is limited by the Eleventh Amendment); Edelman, 415 U.S. at 673-4 (Eleventh Amendment bars federal courts from hearing federal law claims against states for welfare benefits). The other set ignores commonly understood dictates of any such constitutional rules -- for example, that parties cannot invoke federal jurisdiction by consent or that Congress cannot override a constitutional limit on federal jurisdiction -- by treating the state's immunity as if it were based in the common law. See Atascadaro State Hospital, 473 U.S. at 238 (state may waive Eleventh Amendment immunity to suit and so confer jurisdiction on federal court); Union Gas Co., 491 U.S. at 13-19 (Congress may override the Eleventh Amendment in exercise of its authority under commerce clause). See also Fitzpatrick v. Bitzer, 427

U.S. 445, 459 (1976) (Stevens, J. concurring) (Since the Eleventh Amendment applies by its terms to "any suit in law or equity," any "construction of the Eleventh Amendment which acknowledges the federal court's jurisdiction of a case and merely restricts the kind of relief the federal court may grant [is problematic]."). Moreover, part of the "crazy quilt pattern of the Hans doctrine," Welch 483 U.S. at 519 & n. 19 (Brennan, J., dissenting), is that some cases are part of both sets. See Blatchford, 111 S. Ct. 2578 (treating state's immunity both as preexisting the Constitution and surviving its ratification "intact," id at 2581, and yet as grounded in the Constitution itself.).

If this Court accepted petitioners' understanding of Hans and the reach of the Eleventh Amendment, it would resolve the incoherence in the jurisprudence of sovereign immunity, while assuring the supremacy of federal law and preserving a measure of the

immunity to suit in federal court that states now enjoy. For example, if the Constitution's jurisdictional bar against suits in federal court was limited to state claims, that jurisdictional bar could neither be waived by the parties to a suit nor abrogated by Congress. In contrast, however, if the Eleventh Amendment did not bar federal jurisdiction over claims against state officials for violation of federal law, the states could interpose their common law sovereign immunity defense against federal claims, but that defense, like any non-constitutional defense, could be waived. Moreover, the extent to which a state's common law sovereign immunity defense succeeded would turn on whether it "so interfere[d] with and frustrate[d] the substantive right Congress enacted that, under the Supremacy Clause, [it] must yield to the federal interest." Felder v. Casey, 487 U.S. 131, 151 (1988). Accord,

Howlett v. Rose 110 S. Ct. 2430 (1990) (unanimous).

C. To the extent that Hans is understood to extend a constitutional bar to the assertion of federal jurisdiction over claims for monetary relief based on violations of federal law, it is not merely confusing; it represents the kind of "unworkable or ... badly reasoned [decision that] 'this Court has never felt constrained to follow [as] precedent.'" Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)). Indeed, for precisely that reason, this Court's decisions extending the Eleventh Amendment's jurisdictional bar to suits challenging state officials' violations of federal law have been "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." Id. at 2611. See e.g., Edelman v. Jordan, 415 U.S. at 678 (Douglas, J., dissenting); id. at 687

(Brennan, J., dissenting); id. at 688 (Blackmun, J., dissenting); Atascadero State Hospital, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting); id. at 302-04 (Blackmun, J., dissenting); id. at 304 (Stevens, J., dissenting).[12]

D. Some members of this Court have been reluctant to overrule Hans because it has been cited as dispositive in many subsequent cases. Union Gas Co., 491 U.S. at 34-5 (Scalia, J., dissenting in part) (citing Welch, 483 U.S. at 494 n.27 (plurality opinion)). Under petitioners' Eleventh Amendment theory, however, Hans itself and much of its progeny would be reaffirmed, not overruled. For example, Pennhurst, 465 U.S. at 97-106, in which the Court held that state law claims against state officials that are brought in

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[12] Academics have also been sharply critical of those decisions. See e.g., Union Gas Co., 491 U.S. at 24 n. 1 (Stevens, J., concurring) (collecting authorities); Atascadero, 473 U.S. at 258 n. 11 (Brennan, J., dissenting) (same).

federal court under the pendent jurisdiction doctrine are barred by the Eleventh Amendment, would be reaffirmed under our theory. Indeed, "[a] close analysis of [the] cases [listed by Justice Powell in Welch, 483 U.S. at 494 n. 27] indicates that the stare decisis problems involved in a revised reading of Hans, while serious, are not nearly as grave as they would be if the Court overruled Hans." Burnham, supra, 40 Case W. Res. L. Rev. at 977; see id. at 976-84 (analyzing all of the cases cited by Justice Powell in footnote 27 in Welch); Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity, 98 Yale L. J. 1, 119-124 (1988) (same).[13]

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[13] In Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), this Court held that, except in suits for prospective injunctive relief, states and their officials are not "persons" within the meaning of 42 U.S.C. § 1983, thus interpreting § 1983 coextensively with the Eleventh Amendment. Under that analysis, narrowing the limits of Eleventh Amendment immunity would expand § (continued...)

E. Some members of this Court have been concerned about the possible reliance of the states and of Congress on the understanding that Hans extended a constitutional and jurisdictional bar to suits against state officials even for violations of federal law. See, e.g., Union Gas Co., 491 U.S. at 34-5 (Scalia, J., dissenting in part). Those supposed reliance problems can be overstated. See Burnham, supra, 40 Case W. Res. L. Rev. at 990-95. But in any event, purely prospective application of the new Eleventh Amendment rule that petitioners urge can protect the reliance interests of both the states, see American Trucking Assns. v. Smith,

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[13](...continued)
1983's definition of "person" to include some forms of relief against states through suits against their officials. But a state's liability would still be limited to deprivations caused by unlawful official policies, customs or usages; states would not be liable merely by virtue of unlawful acts of their agents. See City of St. Louis v. Praprotnik, 485 U.S 112, 121-27 (1988); Monell v. New York City Dep't. of Social Services, 436 U.S. 658, 691 (1978).

110 S. Ct. 2323 (1990) (plurality opinion); James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2448 (1991) (White, J., concurring); id. at 2452 (O'Connor, J., dissenting), and the Congress, see Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 87-88 (1982) (staying judgment declaring the grant of jurisdiction to the bankruptcy courts unconstitutional to apply the decision prospectively only and thus to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.").

Moreover, this Court can afford relief to the petitioners even if a new Eleventh Amendment rule is announced prospectively. Under this course, the new Eleventh Amendment rule (limiting the reach of the amendment to state law claims) would not be applied even

to the petitioners. Rather relief would be extended to them based on their alternative and narrower theory that, even the current understanding of the Eleventh Amendment does not bar restitution from federal funds or from funds that are segregated by law from a state's general revenues. See Sections I. and II., supra. This narrower ruling would then be applied retroactively, i.e., to petitioners themselves and to all other litigants similarly situated. This result, while protecting legitimate reliance interests, would respect the view that legal rules applied to litigants before the Court must always be applied retroactively. See James B. Beam Distilling Co., 111 S. Ct. 2439 (Souter, J., announcing judgment of the Court).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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No. 91-577

Supreme Court, U.S.
FILED
OCT 7 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BONITA PASCHAL, DANIEL DODSON, PAUL BUCASAS and all others similarly situated,

Petitioners,

v.

LOLETA DIDRICKSON, the Director of the Illinois Department of Employment Security; STELLA CUTHBERT, the Commissioner of the Illinois Department of Employment Security; LYNN MARTIN, the Secretary of the United States Department of Labor; ROBERTS T. JONES, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX VOLUME I TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3301
BONITA PASCHAL, et al.,

Plaintiffs-Appellants

v.

SALLY JACKSON, Director of the Illinois Department of Employment Security, et al.,

Defendants-Appellees.

Appeal from the
United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 83 C 3166--**Frank H. Easterbrook**,
District Judge pursuant to
General Rule 2.30E.

ARGUED MAY 10, 1991--DECIDED JULY 9, 1991

Before BAUER, *Chief Judge*. Posner, and Ripple, *Circuit Judges*.

BAUER, *Chief Judge*. In a second appeal of this case, we are asked to determine whether the State of Illinois' sovereign

immunity bars an award of benefits to two classes of unemployment insurance claimants. Pursuant to 42 U.S.C. § 1983, the claimants challenged the method by which the Illinois Department of Employment Security ("IDES") administered two unemployment insurance programs: the extended benefits ("EB") program, which pays benefits during periods of sufficiently high unemployment to claimants who have exhausted their regular benefits (which last up to twenty-six weeks), and the federal supplemental compensation ("FSC") program, which paid benefits during the recession in the early 1980s to otherwise eligible unemployment insurance claimants who had exhausted their regular benefits and any extended benefits.

In the first appeal, we held that the claimants had proven at trial two due process violations. *Cosby v. Ward*, 843 F.2d 967 (7th Cir. 1988). They established that IDES had

failed to give claimants adequate notice of their work search responsibilities and had failed to provide claimants with notice of the issues to be determined at claims adjudicators' interviews and referees' hearings. *Id.* at 985-86. Because the district court terminated the trial after the claimants had presented their case and before the defendants had a chance to offer a case in rebuttal, we remanded the matter back to the district court for another proceeding.

There never was a second trial, however, because the parties entered into a partial settlement. We call the settlement "partial" because it affected only the EB claimants and provided only for prospective relief. Also, the relief was contingent because the EB program is available only when triggered by adverse economic conditions. The settlement provided no relief whatsoever for the FSC claimants because FSC benefits were distribut-

ed pursuant to a temporary program that since has ended. The partial settlement agreement contained one more provision as well: the parties agreed to litigate any questions concerning the remaining claims for retroactive relief. Acting on that provision, the IDES moved to dismiss the retroactive claims on the ground that the eleventh amendment to the United States Constitution deprives a federal court of jurisdiction to award retroactive relief. The district court agreed, and entered a final judgment approving the consent decree and dismissing the retroactive claims. *Cosby v. Jackson*, 741 F. Supp. 740, 743 (N.D. Ill. 1990). From that judgment, the claimants brought a timely appeal.

The eleventh amendment provides that an unconsenting state is immune from lawsuits brought in federal court by it own citizens as well as by citizens of other states. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Ever

since *Ex parte Young*, 209 U.S. 123 (1908), however, it has been recognized that the eleventh amendment does not prevent a federal court from directing state officials to bring their conduct into conformity with federal law. We have that very situation here. We affirmed the judgment of the district court that certain practices of IDES were held to violate the Due Process Clause of the fourteenth amendment and the "fair hearing clause" of Title III of the Social Security Act, 42 U.S.C. § 503(a)(3). Although the eleventh amendment does not prohibit a federal court from finding liability when state officials' acts are *ultra vires*, it bars a judgment awarding retroactive damages that must come directly from the general revenues of the state. *Edelman v. Jordan*, 415 U.S. 651, 663, 668 (1974). The question we are asked to resolve is whether the accrued unemployment

compensation benefits sought here will have to be paid out of these types of funds.

Before we proceed, we must take some time to consider the workings of the Unemployment Trust Fund scheme. Unemployment insurance was born of the economic ills of the Great Depression. *See generally* Bernstein and Ramel, *The Illinois Unemployment Insurance Act*, 42 Ill. Ann. Stat. XIII (Smith-Hurd 1986). From the beginning, unemployment compensation was conceived as a joint effort among the states and the federal government. The Social Security Act, 42 U.S.C. §§ 301-12007 (1935), contained two provisions that were designed to induce the states to pass unemployment compensation laws. Title III of the Social Security Act provided that approved state unemployment compensation schemes would be financed entirely with federal funds. Title IX assigned a uniform national payroll tax on employers for contri-

butions paid to federally approved state unemployment compensation programs. Employers who pay contributions to a state unemployment insurance program that complies with federal law are entitled to a credit against their federal unemployment tax. 26 U.S.C.A. §§ 3301-3300 (1987). The federal government has imposed certain requirements upon the states primarily to protect funds, but the states have had "wide latitude" to administer their own programs. Bernstein and Ramel, 42 Ill. Ann. Stat. at XIX.

In Illinois, as in other states, the basic operation mechanism of the unemployment compensation program is quite simple: the contributions from liable employers are collected and then distributed to eligible recipients. There are, however, more than a few intermediary steps. Pursuant to the State Unemployment Insurance Act, Ill. Rev. Stat. 1989, ch. 48, ¶¶ 300-820 ("Act"), the

Director of the Department of Employment Security, must deposit all monies payable under the Act in a "clearing account," one of three separate accounts maintained by the Director (the other two being the benefit and special administrative accounts). Ill. Rev. Stat. ch. 48, ¶ 660. The Act provides that "[m]oneys in the clearing, benefit and special administrative accounts shall not be commingled with other State funds." *Id.* After the funds in the "clearing account" clear, the Director must immediately deposit them with the United States Secretary of the Treasury to the credit of Illinois' account in the federal unemployment trust fund. *Id. See also* 42 U.S.C. §§ 503(a)(4) and 1104. The Director may draw upon the funds to pay benefits up to, but not exceeding, the amount in the State's account. *Id.* The monies payable under the Act are the "sole and

exclusive source for the payment of benefits." Ill. Rev. Stat. ch. 48, ¶ 790.

When the State needs funds to pay benefits, the necessary amounts are requisitioned from the federal unemployment trust fund and deposited into an unemployment fund called the "benefit account." *Id. See also* 42 U.S.C. § 1104(f); 26 U.S.C. § 3306(f). In addition to the payments to unemployed workers, the funds in the benefit account may be expended for "refunds of contributions, interest and penalties under the provisions of the Act, the payment of health insurance in accordance with [the Act], and the transfer of payment of funds to any Federal or State agency pursuant to reciprocal arrangements...." Ill. Rev. Stat. ch. 48, ¶ 660. If unclaimed or unpaid amounts remain in the benefit account after the period for which they were requisitioned, they must be used to pay benefits in succeeding periods or

redeposited in the State's account in the federal unemployment trust fund. *Id.*

Within the federal unemployment trust fund is an employment security administration account. Each fiscal year, funds are appropriated from the United States Treasury to the unemployment trust fund in an amount equal to the year's federal unemployment tax receipts. These funds then are credited to an employment security administration account. IDES can requisition money from this account to help cover administrative expenses. *Id.* *See also* 42 U.S.C. § 1101(c). If the federal employment security administration account has insufficient funds to defray IDES' administrative expenses, additional funds are available to IDES in its special administrative account, which is comprised of interest payments and penalties collected from employers who fail to make timely contributions. Ill. Rev. Stat. ch. 48, ¶¶ 661 & 663.

Should the federal unemployment trust cease to exist, Illinois' money would be transferred to the State Treasury for disposition at the behest of the Director in accordance with the Act. Ill. Rev. Stat. ch. 48, ¶ 662. If the State's account falls short, then the governor is authorized to apply to the United States Secretary of Labor for an advance to the State's account. Any federal money received by the State or the IDES Director "shall be received and held by the State Treasurer as ex-officio custodian thereof separate and apart from all other State moneys, and such funds shall be distributed or expended ... for the proper and efficient administration of the Act." *Id.* at 663.

The EB and FSC programs operate a bit differently. States were induced to pass the EB program pursuant to the Federal-State Extended Unemployment Compensation Act of

1970, 26 U.S.C. § 3304(a)(11). Unlike regular benefits, one half of EB payouts are reimbursed by the federal government. 26 U.S.C. § 204(a)(1)(A). Within the federal unemployment trust fund is an extended unemployment compensation account. Funds from the extended unemployment compensation account can be transferred to states to cover the federal government's share. *Id.* § 204(e). As with the regular benefits program, the federal government assists the states in meeting their administrative costs. *Id.* §§ 501, 502 & 1104(c)(1)(A)(i).

In the case of FSC, the benefits are paid out of the State's benefit account. Ill. Rev. Stat. ch. 48, ¶ 660. For each state that entered into an agreement to participate in the FSC program, the federal government reimbursed or advanced all of the funds paid out. *See* Federal Supplemental Compensation Act of 1982, 26 U.S.C. § 3304. The FSC Act

also authorizes funds to assist the states paying for the administrative costs of the program. *Id.* §§ 3304 & 604(c).

With this background in mind, we turn to the matters at issue in this case. The claimants argue that, because Illinois' unemployment compensation funds are held in separate accounts that may not be commingled with other State monies, payment of accrued claims from the fund is not barred by the eleventh amendment. According to this argument, the State can have no interest in immunity because it will not have to pay the relief the claimants seek. An award of EB would not affect the state treasury because half of it is reimbursed from the federal treasury and the other half from a segregated fund. As to FSC, the claimants argue that the whole award would be paid from federal funds. IDES is not responsible for any of the administrative costs associated with

paying out of either fund. The claimants further submit that, because the State's collections substitute for the federal unemployment insurance tax and the federal government holds the funds until the State needs them, the State merely acts as the federal government's agent for collecting and dispersing part of the revenues necessary to operate the unemployment insurance program.

This, in essence, is the "trust fund doctrine," which holds that the eleventh amendment does not bar recovery of funds segregated from general public funds. The claimants pin their hopes on *Miller-Davis v. Illinois State Toll Highway Authority*, 567 F.2d 323 (7th Cir. 1977), in their words, a "seminal" case that applied the trust fund doctrine to allow recovery of damages for alleged contract violations by the Illinois State Toll Highway Authority. We permitted such recovery after analyzing the financial

organization of the Highway Authority and determining that its funds were sufficiently segregated from the general public funds in the Illinois State Treasury, so that any judgment against the fund was not a judgment against the State. *Id.* at 327.

In addition to *Miller-Davis*, the claimants point out the admittedly ample authority that recognizes that a lawsuit is not against the sovereign when the relief has no impact upon the state itself. *See, e.g., Camacho v. Bowling*, 562 F. Supp. 1012 (N.D. Ill. 1983); *Kostelic v. Bernardi*, 538 F. Supp. 620, 622 (N.D. Ill. 1982); *Jenkins v. Bowling*, 80 C 928 (N.D. Ill. 1982), *aff'd in relevant part*, 691 F.2d 1225, 1235 (7th Cir. 1982). Among this authority is a body of case law that has allowed plaintiffs to sue a state in federal court for recovery of past unemployment claims on the ground that the state's unemployment compensation fund is sufficiently

segregated from the general revenue fund. *See, e.g., Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983)1 *Brewer v. Cantrell*, 622 F. Supp. 1320, 1323 (W.D. Va. 1985), *aff'd*, 796 F.2d 472 (4th Cir. 1986); *Bowen v. Hackett*, 387 F. Supp. 1212 (D.R.I. 1975); *Bigelow v. Michigan Employment Security Comm'n*, [1975-79 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 21,520 (E.D. Mich. 1978); *Black v. Caldwell*, [1975-1979 Transfer Binder] Unemp. Ins. Rep. (CCH) ¶ 21,485 (N.D. Ga. 1976).

Well aware of this precedent, the district court instead cast its lot with the Tenth Circuit. In *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989), a group of aliens who had been denied unemployment compensation sued for declaratory and injunctive relief seeking both prospective and retroactive relief for the wrongfully withheld benefits. The court of

appeals indicated that it had "great difficulty" with cases that have found the segregation of funds dispositive as to the issue of whether a claim for accrued benefits is barred by the eleventh amendment. The court stated that it did not believe that a state's sovereign immunity "can be abrogated through reliance on notions of whether such relief would be paid out of a general or special revenue fund." *Id.* at 794.

We, too, have great difficulty with the view that a state's structure is dispositive of whether one can sue the state for accrued benefits. Examining the source of funds once might have proven useful in identifying the real party in interest, but such an examination is of little consequence in determining whether damages should be paid. It is a complete waste of time to engage in the niceties of determining whether a particular department of a state is "of the United

States" for eleventh amendment purposes when the lawsuit is against the state and judgment will be entered against the state as an entity. We prefer an approach that disregards the source of state funds. To do otherwise forces courts to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed "the state." The district court hit the nail on the head: "Where Illinois gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state." *Cosby*, 741 F. Supp. at 742. Moreover, it stands to reason that digging into a segregated account funded by federal money to pay retroactive claims could have an impact on the state treasury. For example, it is not altogether clear that total reimbursement from the federal government to the state is a sure thing. Title 42 § 502(a),

the section of the United States Code dealing with computation of amounts paid to the states for proper administration of their employment compensation programs, states that the Secretary of Labor "shall not certify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year." In an era of mandatory budget reduction and rising unemployment rates, there is no guarantee that the federal government will continue to be "Johnny-on-the-spot" with ready cash in hand.

The trust fund argument also flies in the face of two United States Supreme Court decisions that have held that the segregation of funds does not abrogate the eleventh amendment. In *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946), and *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944), taxpayers sued state officials to

recover taxes paid under protest. The money was segregated and held in trust pending the outcome of the litigation. In both cases, the Court held that the suits were against the state as an entity and thus barred by the states' sovereign immunity. It is an "immaterial difference," *Great Northern*, 322 U.S. at 43, that the money is segregated and held separate from the state's general funds when, in the end, any damage award is against the state.

As a last resort, the claimants suggest that the Supreme Court's eleventh amendment jurisprudence has changed significantly since *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1983). They contend that, "under the Court's recent analysis, whether a state is protected by sovereign immunity turns on the balance between 'the effect[s] of the relief sought,'" Appellants' Brief at 26 (quoting *Pennhurst*, 465 U.S. at 107).

Naturally, the claimants argue that, when all factors are considered, the balance of equities tips in their favor because they seek a remedy of IDES's violation of the claimants' federal rights. More pointedly, the claimants argue that if we rule against them, the EB claimants would be left without a remedy because the EB program switches "on" only during periods of significantly high unemployment. It has been "off" for six years.

Pennhurst -- as we read it -- recognizes a need to balance the supremacy of federal law against the constitutional immunity of the states, but does not abandon the basic reasoning of *Edelman* and *Young*. In fact, the Court in *Pennhurst* reiterated that "[u]nder the theory of *Young*, [a lawsuit challenging the constitutionality of a state official's action] would not be one against the State since the federal-law allegation would strip the state officer of his official authority.

Nevertheless, retroactive relief [is] barred by the Eleventh Amendment." 465 U.S. at 103. The Court emphasized that the recognition of the need to accommodate these competing interests is "the significance" of *Edelman*: "*Edelman's* distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States." *Id* at 106. The claimants are seeking vindication of their federal rights through a retroactive damage award against the State. As we see it, this interest is insufficient to override the command of the eleventh amendment.

The relief claimed by the claimants is barred by the eleventh amendment. The order of the district court approving the consent decree and dismissing the complaint is hereby

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

No. 83 C 3116

Irving COSBY, et al., Plaintiffs,

v.

Sally JACKSON, Director of the Illinois Department of Employment Security, et al., Defendants.

No. 83 C 3116.

United States District Court,
N.D. Illinois.

August 16, 1990.

OPINION

EASTERBROOK, Circuit Judge*

Earlier proceedings, see 625 F.Supp. 619 (N.D.Ill.1985), affirmed in part and reversed in part, 843 F.2d 967 (7th Cir.1988), left this case in potential need of a second trial to determine whether the state's procedures for adjudicating claims for extended unemployment benefits complied with the due process clause of the fourteenth amendment. The parties decided that settlement would be

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* Of the Seventh Circuit, sitting by designation.

preferable to extended combat, and they negotiated a consent decree concluding most of the case.

This decree provides that the Illinois Department of Income Security shall give applicants for benefits concrete notice of the extent to which they must search for work. Requirements tailored to individual circumstances are possible, but the decree includes a notice, suitable for all comers, that suffices. It tells applicants that they must do something every day to find work, that they must be prepared to accept the minimum wage (or their own levels of supplemental unemployment benefits), and that they must be willing to travel 90 minutes each way to and from work. The decree also provides forms the Department will send to claimants informing them of the issues (but not the evidence) to be raised during interviews with claims adjudicators or hearings before referees.

Finally, the decree affords its benefits to all persons whose adjudications are not yet final. I approved this decree, after a hearing under Fed.R.Civ.P. 23(e), because it resolves the principal issues presented by the case yet preserves the Department's freedom to change policy, so long as it continues to provide the constitutionally necessary notice. See *Bates v. Johnson*, 901 F.2d 1424 (7th Cir.1990).

What the parties could not resolve is whether retroactive relief is possible. This question has two stages: first, whether the state violated the Constitution at all (a question that could be resolved only after a second trial); second, whether, if so, the eleventh amendment allows the court to afford relief to persons whose unemployment claims were resolved and closed before the date of its decision. Because *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662

(1974), gives the general answer "No" to this second question, the parties have concentrated their attention on whether the nature of unemployment compensation creates an exception to *Edelman*.

Plaintiffs submit that it does, because the money to pay for unemployment benefits (and hence any retroactive relief) does not come from the state's general revenues. Illinois maintains a segregated fund that is financed by "contributions" (read, taxes) from employers, Ill.Rev.Stat. ch. 48 ¶¶ 550-581. Illinois pays all regular, extended, and supplemental unemployment benefits from this fund. The United States reimburses Illinois for half of the cost of the extended benefits and all of the cost of the supplemental benefits. Most of the money thus derives from the federal rather than the state treasury; even the portion nominally paid by Illinois "really" comes from employers rather than the

people at large. Because the general revenues of the state are not threatened, plaintiffs conclude, the eleventh amendment does not apply. One court of appeals has embraced this line of argument. *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir.1981), cert. denied, 459 U.S. 1150, 103 S.Ct. 796, 74 L.Ed.2d 1000 (1983) (over the dissent of three Justices.).

Illinois replies that the source of the funds is irrelevant. The eleventh amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

The "Judicial power" -- that is, federal jurisdiction -- does not embrace a suit "commenced or prosecuted against one of the

United States". Where the state gets the money to pay a judgment, indeed whether the suit asks for money, is irrelevant to this rule. A court's first and only question is whether the defendant is "one of the United States". If the answer is yes, then the suit is forbidden. Because a state official sued in an official capacity (which describes all of the defendants to this suit) is treated as a "state", *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985), the suit fails at the threshold. How Illinois would satisfy the judgment -- in particular, that Illinois gets money from employers and the federal government -- is irrelevant. One court of appeals has rejected *Brown* and held that the source of payments for retroactive unemployment compensation does not affect the scope of immunity the eleventh amendment affords. *Esparza v. Valdez*, 862 F.2d 788, 794-95 (10th Cir.1988), cert.

denied, ___ U.S. ___, 109 S.Ct. 3214, 106 L.Ed.2d 565 (1989). I agree with *Esparza* and disagree with *Brown*.

Start with the text of the Constitution. Because this is a suit "commenced or prosecuted against one of the United States", the eleventh amendment applies.[1] Even prospective relief cannot be had against "one of the United States". *Cory v. White*, 457 U.S. 85, 90-91, 102 S.Ct. 2325, 2328-29, 72 L.Ed.2d

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[1] Putting to one side the question whether the eleventh amendment (as opposed to general notions of sovereign immunity) applies at all to federal-question or constitutional litigation. The text speaks only of cases under the diversity and alienage jurisdictions. Because prevailing doctrine treats the principles of sovereign immunity applicable to federal-question cases (including constitutional cases) identically to those under the eleventh amendment, I treat this case as if the eleventh amendment governs directly. But see *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S.Ct. 2273, 2286-89, 105 L.Ed.2d 1 (1989) (Stevens, J., concurring), arguing that the "actual" eleventh amendment is stronger than the background principles of sovereign immunity that apply in the absence of a statute.

694 (1982); *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Adams v. Indiana*, 795 F.2d 27 (7th Cir.1986). So if this is a suit against Illinois, the court cannot grant the plaintiff's request.

There is of course a long tradition of awarding injunctive relief that effectively governs states, but this depends on *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 411, 52 L.Ed. 714 (1908), which holds that state officials who violate the Constitution aren't "really" acting for the state at all. The relief runs against *them*, not against "the state". Because the decree does not bind "one of the United States", it does not encounter the eleventh amendment. *Edelman* holds that *Young* does not authorize damages relief. A court cannot pretend that the state actors before it are acting as private parties when the relief comes out of the state's pockets. Even fictions have their limits; retroactive relief

presses the *Young* fiction past the breaking point.

What I need to decide, then, is whether the plaintiffs want relief from "one of the United States". To that the answer must be "Yes". They have sued state officials in their official capacities only, see *Graham*. Retroactive relief would bind the state in its role as a sovereign. That Illinois could recoup the outlay from someone else does not diminish the quality of the judgment as one against the state. If a retailer that sells a defective toaster impleads the manufacturer in response to an action on the warranty, the judgment binds the retailer even though the manufacturer's pockets ultimately will be tapped for payment. Closer to the mark stands the principle that a state's willingness to indemnify its employees for liability under 42 U.S.C. § 1983 does not mean that the litigation is against "the state". *Duckworth*

v. Franzen, 780 F.2d 645, 650-51 (7th Cir.-1985). A plaintiff may look only to the defendant for satisfaction of the judgment; where the employee gets the money is no concern of the plaintiff or court. So too with suits against the state. Where Illinois gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state.

I recognize that many decisions, including at least one from the Seventh Circuit, closely examine the source of funds to pay a judgment. *Miller-Davis Co. v. Illinois State Toll Highway Authority*, 567 F.2d 323, 327-30 (7th Cir.1977). They do this, however, not because the eleventh amendment permits suits against "one of the United States" when the state has a segregated fund, but because it is often unclear whether the defendant is "one of the United States". Special-purpose

districts and agencies have proliferated; these may have many of the aspects of private corporations, with some of the aspects of a state. What are we to make of a university system with some public trustees, some private trustees, an endowment, tuition income, and an appropriation from the state treasury? Questions such as this send courts scurrying to examine the details of the defendant's structure and finances. To determine whether the defendant is "the state", courts look at who appoints and controls the entity, who pays judgments against it, and so on. That was the point in *Miller-Davis*, ending in the conclusion that an entity outside the direct chain of control in the executive branch of Illinois and without access to its Treasury was not "the state" after all. No one doubts, however, that the Illinois Department of Employment Security is part of Illinois. It

is a line agency of the executive branch, answerable to the Governor.

Knowing that the Illinois Department of Employment Security is "one of the United States" brings the case to a close. That Illinois funds the Department's operations by taxing employers does not make it less a state operation. Most state revenues come from taxes, and the identity of the taxed group cannot matter. Neither does it matter that the federal government offers reimbursement. Money flows in because the federal government gives money to *states* for particular programs. Segregation of the monies also cannot matter. Everything the plaintiffs say about unemployment compensation could be said about the Social Security program, with a special tax base and segregated receipts. Yet the Supreme Court regularly applies principles of sovereign immunity to suits in which judgments would be satisfied out of the

Social Security Trust Fund. *E.g., Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), in which all Justices assumed that sovereign immunity would forbid even prospective relief affecting the Trust Fund in the absence of a statute waiving that immunity. Just so, the source of the money to pay unemployment

benefits does not make the suit less one against the State of Illinois. *Edelman* itself involved state funds that were replenished by the federal government. See also *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 66 S.ct. 745, 90 L.Ed. 862 (1946); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 64 S.ct. 873, 88 L.Ed. 1121 (1944).

Because retroactive relief would run against a state, the eleventh amendment forbids the court to award a remedy -- including "notice relief", *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371

(1985); *Watkins v. Blinzinger*, 789 F.2d 474, 483-84 (7th Cir.1986). It is consequently unnecessary to decide whether Illinois violated the Constitution; relief beyond that approved in the consent decree would be impossible even if it did. The court will accordingly enter a final judgment approving the consent decree and otherwise dismissing the complaint on the basis of the eleventh amendment.

No. 86-1181

**Irving O. COSBY, et al.,
Plaintiffs-Appellants,**

v.

**Sally WARD, Director of the Illinois Department of Employment Security of the Illinois Department of Labor, et al.,
Defendants-Appellees.**

No. 86-1181.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 24, 1986

Decided March 4, 1988.

Before, WOOD, COFFEY, and RIPPLE, Circuit Judges.

HARLINGTON WOOD, Jr., Circuit Judge.

Plaintiffs are representatives of two classes of unemployment insurance claimants. They brought suit under 42 U.S.C. § 1983 against the Director of the Illinois Department of Employment Security (IDES), the United States Department of Labor (DOL), its Secretary, and the Assistant Secretary of Labor for Employment and Training, alleging that IDES's administration of two unemployment

insurance programs violated federal law and the plaintiffs' due process rights under the United States Constitution. After the plaintiffs presented their evidence, the state defendants moved for an involuntary dismissal of the action under Federal Rule of Civil Procedure 41(b). The district court granted the motion and entered judgment against the plaintiffs who have appealed. We affirm on the statutory issues, reverse on the constitutional issues, and remand for further proceedings on the latter issues.

I. FACTUAL BACKGROUND

The district court adopted the parties eighty-seven-page stipulation of facts. We will do the same, providing only a brief summary drawn from the stipulations and the district court's findings. *See Cosby v. Ward*, 625 F.Supp. 619 (N.D.Ill.1985).

A. The Programs

Unemployed people in Illinois who are eligible for unemployment insurance are entitled to the lesser of either twenty-six weeks of regular benefits payments, or the total insured wages for a base period. Illinois Unemployment Insurance Act (IUI Act), Ill.Stat.Ann. ch. 48, ¶¶ 300-820. After these regular benefits are exhausted, the claimant may be eligible for payments under two other programs: the extended benefits (EB) program, or the federal supplemental compensation (FSC) program. The EB payments are made under the Federal-State Extended Unemployment Compensation Act of 1970 (EUC Act), 26 U.S.C. § 3304(a)(11), and IUI Act § 409, Ill.Stat. Ann. ch. 48, ¶ 409. Benefits under the program become available when unemployment in the state reaches a specified level. A claimant may receive up to thirteen weeks of EB payments.

After a claimant has exhausted both his regular benefits and EB, he may be eligible for payments under the FSC program. Federal Supplemental Compensation Act of 1982 (FSC Act), 26 U.S.C. § 3304 note. The maximum period for a claimant to receive FSC payments is from ten to twenty-six weeks. There is no requirement of a "trigger level" of unemployment as there is under the EUC Act.

Regular benefits are paid by the state from taxes collected from employers. The state makes EB payments also, but the federal government reimburses the state for fifty percent of the program's cost under section 204 of the EUC Act. The federal government pay all FSC benefits under the FSC Act, and also compensates states for the costs of administering EB and FSC programs.

In order to receive federal money, the state must comply with federal statutes and interpretations thereof by the DOL and

Illinois has entered into a contract with the DOL, agreeing to abide by the FSC program rules. The EUC Act and the FSC Act require people claiming EB to actively search for work. They must provide the state with evidence of their search efforts. There is no statutory provision explaining exactly how a claimant can demonstrate compliance with these requirements.

After a claimant has exhausted his regular benefits, a claims technician at the local IDES office explains to the claimant that he may be eligible for further benefits. The technician gives each claimant a written notice about the programs and explains the notice. Many technicians are multi-lingual, and each office has technicians who speak the language of the local population. Notices about the programs, however, are written in English. Claims technicians give claimants form questionnaires to return every two weeks.

The questionnaires ask for information about the claimant's search for work, and include such questions as "[w]hat is the lowest starting wage you will accept?" and "[h]ow long (in time) are you willing to travel each way to work?" These questions and answers are used to identify restrictions that the claimant may be placing on his work search. Claims that are clearly acceptable are processed for payment. Claims that raise questions about the claimant's restrictions are sent to an adjudicator. When this happens, an employee of the local office will send the claimant a notice that he is to appear in person at the local office. although this notice is also intended to inform the claimant of the problem, the district court found that "frequently it is filled out in such a perfunctory fashion that the claimant could not know why he had been summoned." 625 F.Supp. at 625.

The adjudicator discusses with the claimant his answers to the questionnaire, and decides whether the claimant has understood the questions and answers. If the adjudicator finds that the claimant misunderstood a question, the adjudicator may allow him to withdraw his original answer and supply a correct one. The claimant may even return home to retrieve additional documentation for his answers. The adjudicator will not, however, coach a claimant on acceptable answers, and once the adjudicator has determined that the claimant's restrictions are unreasonable, the claimant can no longer "correct" his answers. At the conclusion of the interview, the claims adjudicator will render a written decision on the claimant's eligibility for benefits. If the claimant is found to be ineligible, he will be denied benefits for the two-week period covered by the questionnaire. Once denied benefits, a

claimant is not eligible for benefits again until he has worked for at least four weeks.

A claimant who is denied benefits by a claims adjudicator may appeal that denial to a referee. Referees are lawyers who are independent of the vagaries of the local offices. The claimant may file written reasons for his appeal, and, when he meets with the referee, he may present evidence. If the claimant does not speak English, and the referee does not speak the claimant's language, IDES will appoint an interpreter. The hearing is recorded. After reviewing with the claimant his questionnaire and the meaning of the claimant's answers, the referee will make a new determination of the claimant's eligibility. He is not bound by the adjudicator's findings. The referee will file a written decision, which is more formal than the adjudicator's decision. The claimant may

appeal this decision, if it is unfavorable to him, to the Board of Review.

The Board of Review is a administrative court within IDES. As a party may do in other courts, a claimant may file written briefs, personally or by counsel, arguing legal and factual questions. Unlike the referee, the Board may not disregard the previous findings, but instead makes its decision based on the record established before the referee. Decisions are not routinely published, but IDES maintains a digest of the Board's decisions both for its own purposes and for the public. A manual of benefits decisions also provides the public with access to some of the Board's decisions.

The last avenue for appeal is to the state courts. Ill.Stat.Ann. ch. 48, 520; ch. 110, ¶¶ 3-101 to -112. By the time this level of review is accomplished, however, many months have passed.

Claims technicians, adjudicators, and referees all receive training from IDES on the nature of and criteria for the benefits programs. All of these people receive copies of the hundreds of bulletins that IDES sends out. Although they may not remember each specific bulletin, the district court found that "the technicians, adjudicators, and referees who testified were familiar with the general principles in the bulletins." 625 F.Supp. at 625.

In making their decisions on a claimant's eligibility for benefits, reviewers (claims technicians, adjudicators, referees, and the Board) have at their disposal two sources of information that they frequently do not use. One of these sources is a newsletter that IDES publishes through its Economic Information and Analysis Unit. This Unit collects information about Illinois labor markets and its newsletter contains data about the state

as a whole, and in city and county segments. Information about smaller areas is contained in quarterly publications. The district court found that "the Unit does not determine whether there are openings in particular occupations, and none of the [reviewers] who testified made any use of the data disseminated by the Unit." 625 F.Supp. at 626.

Another potential source of information for the reviewers is the Job Service, the state agency that helps unemployed people find work. Registration with Job Service is a prerequisite to eligibility for any unemployment compensation. Claimants and Job Service counselors work together in devising for a claimant a plan to search for new work. Although the counselors presumably know where a claimant can look for work to suit his particular skills, they do not ensure that the claimant's plan complies with the work search rules used by the unemployment offices.

Similarly, the approval by Job Service of a claimant's work search plan carries no weight with the administrators of the EB or FSC programs.

B. State Implementation

Benefits under the EB and FSC programs are restricted by federal law to people actively seeking work. To implement this law, IDES has issued to its staff several bulletins pertaining to the work search requirement. One such bulletin contains the following language.

> Due to the EB claimants' prolonged period of unemployment, it is intended that he be required to make a more diligent effort to seek work than would normally be required of an individual receiving regular benefits. Accordingly, the weekly eligibility of each EB claimant must be monitored in light of the special requirements concerning search for

work.... All EB claimants must be advised of the work search requirements that they must meet each week.... It is expected that the EB claimant's efforts to find work should increase because of the duration of his unemployment.

If there are no or few openings in the claimant's customary occupation, he must broaden the types of work sought to meet the active search for work requirement. Claimants who restrict their job search to their customary occupation, or who have other restrictions (i.e., wages, hours, travel, etc.) not based upon physical or mental capability, and by these restrictions fail to maintain an active systematic search for work, may be ineligible for extended benefits.

In determining whether the individual has met the active search for work

requirement, where openings in the individual's customary occupation are few or nonexistent, the following areas shall be considered:

a. Available Jobs -- Hiring pattern

b. Economic Activity -- Labor market

c. Claimant's physical and mental ability

....

The level of economic activity in the labor market area and the kinds of work available are important factors in determining whether a systematic and sustained work seeking effort is being made. Eligibility Review Program and Job Service information and any job counseling interviews as well as the results of aptitude testing would be pertinent.

IDES Bulletin No. 1467, Supp. 1 (Aug. 20, 1981). The form that the claims technicians

give to claimants includes the following information:

> You are expected to relax your restrictions with respect to the type of work you will accept, hours, rate of pay, travel, time, etc. (for example: A senior accountant would be required to accept work as a junior accountant or bookkeeper, etc.) ... If there are no or few openings in your regular occupation, you are expected to seek any work within your physical and mental capabilities for which you have the background to perform.... You may use your usual methods of contacting potential employers (in-person contacts, registration with private employment agencies, reporting to your union as required, answering or placing want ads, resumes, telephone calls, etc.,) [sic]. However, your work search must include some independent work

> search efforts each week for this reason....
>
> ... If you do not have a definite prospect to return to work in 4 weeks or less, your job prospect classification in [sic] "not good". If your classification is "not good", any work that is within your physical and mental capabilities that you have the background to perform is suitable, provided that ... the gross average weekly wage exceeds your weekly benefit amount (plus any supplemental unemployment benefits paid to you by a former employer)....
>
> If you fail to conduct an active search for work or you refuse to apply for or to accept suitable work ... you will be held ineligible for Extended Benefits for the week in which such failure occurred and for each week thereafter until you have worked in at least 4 weeks

with earning in each week, which when totaled, equals at least 4 times your weekly benefit amount.

Benefit Rights Information for Extended Benefits Claimants form.

When a claimant is ineligible for EB, either because the program is not in effect in Illinois or because he has exhausted his benefits, he may be eligible for FSC. The IDES issued bulletins with instructions for implementing the FSC program. The bulletins do not interpret the program's requirement that a claimant seek work actively, but there is no suggestion that the requirement has a different meaning than it does under the EB program.

Claimants seeking FSC benefits were given the following instructions for seeking work:

(1) On each normal working day you must do something positive to find work.

(2) ... You must make work contacts on at least 3 days per week, resulting in at least 5 employer contacts per week. This may mean looking for work beyond your normal commuting distance as well as increasing one-way travel time. You are expected to lower your salary demands, even to the minimum wage, if there are no prospects of finding work in your customary occupation.

(3) If there is any day in which you made no employer contacts, you must indicate on the form what positive effort you made that day to find work, for example, preparing a resume, contacting a union or a professional organization, attending an employment seminar, etc.

(4) If prospects for obtaining work in your usual occupation are poor

(that is, if you do not have a *definite* offer to begin work within four weeks ...), you will be expected to accept any offer of suitable work that is listed with the State Job Service or offered in writing. Any work will be considered suitable if you are reasonably fitted by training and experience to perform the work or if the necessary training is provided when you lack the required skills.

To be suitable, the gross pay of any work offered must exceed your weekly benefit amount plus any Supplemental Unemployment Benefits (SUB) you receive form your former employer, or the State or Federal minimum wage, whichever is greater.

The law provides for denial of FSC to anyone who does not observe the above

requirements. The disqualification will continue until the person has worked in at least four weeks and earned not less than four times his or her weekly benefit amount.

Important Notice for Federal Supplemental Compensation (FSC) Claimants form.

Although these notices to claimants did not elucidate bright-line rules for the conduct of their work search other than the requirements that a claimant must make five contacts with potential employers over at least three days of every week and that a claimant must accept any wage over the stated minimum, the plaintiffs claimed, and the district court found, that IDES used objective rules of thumb to determine claimants' eligibility for benefits. 625 F.Supp. at 629. These rules of thumb developed to help the reviewers evaluate claimants' questionnaires. Claims routinely would be denied if the

claimant did not state that he would travel at least one hour each way for work. Similarly, a claimant must have said that he was willing to work on different shifts for at or near the minimum wage. A claimant also was required to visit employers in person. When claimants were questioned about their answers on the questionnaire, they had the opportunity to revise these answers. However, they did not know about the rules of thumb, and inadequate answers to the questions were used to demonstrate that they were not engaged in an active search for work.

Although adjudicators and referees testified at trial that the rules of thumb were not necessary to evaluations of claims, the district court found that the rules were rarely relaxed. *Id.* The court also found that the reviewers would not "test" claimants' answers to items on the questionnaire, or use collateral methods to determine, for example,

the distance claimants were actually traveling to search for work, or the wage claimants were requesting on job applications. The reviewers simply let the claimants disqualify themselves by accepting their answers at face value.

The district court found that IDES decisionmakers, despite the requirements in their own bulletins, did not use information about the labor market or job openings in evaluating claims from people whose job prospects were "not good". "They do not know which occupations have 'few or no openings'; they do not know anything systematic about levels of economic activity." 625 F.Supp. at 629. The district court went on, however, to find that the IDES decisionmakers were adequately apprised of employment conditions in claimants' occupations from information gleaned from the claimants themselves. They could detect patterns of unemployment from the claimants' occupations, and from the

length of time they had been unemployed. This sort of empirical knowledge gave the reviewers the ability to make "astute inferences" about the labor market. *Id.*

C. Federal Regulations

The DOL administers the EUC Act and the FSC Act federally. This amounts to assessing the state' compliance with the federal regulations in their programs to determine whether to reimburse the states. Pursuant to the EUC Act, Illinois enacted section 409 of the IUI Act, which reproduces the federal rules. Pursuant to the FSC Act, Illinois and the DOL in September 1982 entered into a contract under which the state promised to "'perform all of the functions and duties ... in accordance with the [FSC] Act as interpreted by the Secretary or the Department of Labor.'" 625 F.Supp. at 630.

The district court found that although the DOL has not promulgated any regulations

concerning the administration of the EUC Act or the FSC Act, it has circulated to state employment security agencies "general administration letters" (GALs) and "unemployment insurance program letters" (UIPLs). *Id.* These letters are sometimes published in the Federal Register; the district court, however, found that they were not regulations because they were not circulated for notice and comment before the DOL adopted them. *Id.* Advance copies of GALs were sometimes available to state agencies, but, according to the court, this was for the purpose of supplying extra notice, not an opportunity to comment. *Id.* The court found that "the addressees of the GALs did not have the sort of personal service that would permit the documents to be treated as regulations in the absence of published notice and opportunity for comment." *Id.* (citing 5 U.S.C. § 553(b)).

The court found that, at the time of trial, the definitive GAL was 2-83, in which the DOL stated that the requirements for seeking work under the FSC Act were the same as those under the EUC Act. *Id.* at 631; GAL 2-83, 47 Fed.Reg. 54706 (1982); *see also* UIPL 7-84, 49 Fed.Reg. 4271 (1984). The EUC Act requirements are described in GAL 21-81, an unpublished letter. *See* Appendix. The EUC Act generally requires a claimant to make a more active, "systematic and sustained," search for work than a recipient of regular benefits. He must broaden the types of work he seeks, and lower his wage expectations. If a claimant fails to accept a job offer which pays at least the minimum wage and not less than his benefit payments, he will be disqualified from receiving further EB payments. The EUC Act generally requires the state to evaluate the claimant's job search in light of the claimant's physical and mental

ability, job openings, and the labor market conditions. The state classifies each EB claimant's job prospects as "good" or "not good" and monitors each claimant's eligibility by requiring "tangible evidence" of an active and suitable search for work each week. This evidence must be in line with the state's standards for a "systematic and sustained" search for work. A claimant whose job prospects are "good" has less stringent work search requirements than a claimant whose prospects are "not good."

The plaintiffs argue that by following rules that are stricter than the federal requirements IDES violated the EUC Act, the FSC Act, the DOL letters, the Social Security Act (42 U.S.C. § 503(a)), and the plaintiffs' rights to due process under the fourteenth amendment to the Constitution. Specifically, the plaintiffs alleged at trial that IDES's standards are based not on claimants' actual

work search efforts but instead on answers to hypothetical questions that do not relate well to the federal requirements. The plaintiffs also argue that claimants are disqualified from receiving benefits by the state without regard to the DOL guidelines. They assert that they are subject to disqualification based on answers to the hypothetical questions without receiving adequate notice of what is expected of them. Additionally they contend that the notice claimants do receive is incomplete with regard to the work search requirements. Because of the inadequate notice, the plaintiffs assert, they are subject to disqualification at interviews and hearings without being informed about what matters are before the claims adjudicators or referees. The district court found no merit in any of these contentions, and granted defendants' motion for involuntary dismissal under Federal Rule of Civil Procedure 41(b).

The plaintiffs argue that the trial judge erred in granting this dismissal. We agree and remand to the district court.

II. STANDARDS OF REVIEW

"In ruling on a [Rule] 41(b) motion, the court must take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as the court believes it is entitled to receive." *Sanders v. General Services Administration*, 707 F.2d 969, 971 (7th Cir.1983). "The district court should make no special inferences in the plaintiff's favor .. [but] must weigh all the evidence and decide where the preponderance lies." *Furth v. Inc. Publishing Co.*, 823 F.2d 1178, 1179 (7th Cir.1987).

With respect to undisputed facts, such as the stipulated facts in this case, a reviewing court "is as capable as was the district court of determining whether [plaintiffs'] evidence, as a matter of law, was

insufficient to establish a right to relief." *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 273 (7th Cir.1976). The district court's findings of fact, however "shall not be set aside unless clearly erroneous." Fed.R.Civ.P. 52(a). "[T]he clearly-erroneous rule ... embraces not only facts of the 'who did what to whom' variety but also legal inferences from those facts." *Wright v. United States*, 809 F.2d 425, 428 (7th Cir.1987). A reviewing court may determine a finding is clearly erroneous only when the court is left "'with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948)). "[T]he question [of] whether the district court's fact findings are clearly erroneous

is separate from the question [of] whether, under the facts and the law, the plaintiff has shown no right to relief." *Furth*, 823 F.2d at 1180 (citing 5 J. Moore, J. Lucas, and J. Wicker, Moore's Federal Practice ¶ 41.13[1], at 41-166 to -167 (2d ed. 1986)). Based on the district court's findings of fact, this court must determine as a matter of law whether the plaintiffs proved by a preponderance of the evidence that IDES's administration of the state's unemployment insurance program violated the federal statutes or the Constitution.

III. DISCUSSION

The plaintiffs claim that the state incorrectly distinguished between eligible and ineligible claimants based on the state's interpretation of the work search rule. They argue that IDES's use of its rules of thumb violated the DOL letters, specifically, GAL 21-81. The plaintiffs also challenged IDES's

failure to use labor-market and hiring pattern information in its determinations of eligibility.

A. Jurisdiction

Because they challenge IDES's administration of the EB and FSC programs as violative of the Constitution and federal laws, the plaintiffs believe that their case is clearly within the language of 28 U.S.C. § 1331, which provides federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." The federal defendants assert that the district court lacked subject matter jurisdiction over the action, and moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(1). The court denied the motion, setting forth its reasoning in a memorandum opinion. *Cosby v. Bernardi*, No. 83 C 3116 (N.D.Ill. Apr. 4, 1984).

The defendants raise only one of their four jurisdictional arguments on appeal. They assert that the language of the EUC Act and the FSC Act authorizes only state courts to review EB and FSC benefit determinations,[1] and that these acts supersede 28 U.S.C. § 1331. Therefore, the defendants believe, the plaintiffs should have brought their case in

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[1] The EUC Act states that

> [e]xcept where inconsistent with the provisions of this title, the terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof shall apply to claims for extended compensation and to the payment thereof.

EUC Act 202(a)(2), 26 U.S.C. § 3304 note. The FSC Act states that

> the terms and conditions of the State law which apply to claims for extended compensation and to the payment thereof shall apply to claims for Federal supplemental compensation and the payment thereof; except where inconsistent with the provisions of this subtitle or with the regulations of the Secretary promulgated to carry out this subtitle.

FSC Act § 602(d)(2), 26 U.S.C. § 3304 note.

state court, pursuant to the Illinois Administrative Review Act, Ill.Stat.Ann. ch. 110, ¶¶ 3-101 to -112. The district court found this argument to be meritless and we agree.

The Supreme Court considered language similar to that in the EUC and FSC Acts in a union's challenge to state agencies' administration of the Trade Act of 1974, 19 U.S.C. § 2101 et seq. *International Union, UAW v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986). The UAW argued that the states were improperly determining eligibility for trade readjustment allowance (TRA) benefits. The Secretary of Labor relied on language in the Trade Act which made TRA entitlement decisions by state agencies "subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to the extent," 19 U.S.C. § 2311(d), to argue that no union members could challenge

the DOL's policy directive that allegedly resulted in denial of TRA benefits to union members. The Court found that "[t]he Secretary's arguments simply miss the point of petitioners' claims." 106 S.Ct. at 2530. The federal courts were not becoming involved, through the UAW's suit, in individual benefits determinations, which would "remain the province of state authorities," *id*, but were instead asked to rule on the validity of the states' administration of the entire program in terms of compliance with federal law and the Constitution. While the language in the Trade Act, which is more restrictive than that of the EUC Act or the FSC Act.,

> vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, there is no indication that Congress intended §

2311(d) to deprive federal district courts of subject-matter jurisdiction under 28 U.S.C. § 1331(a) ... to hear statutory or constitutional challenges to the federal guidelines themselves. Indeed, we have frequently upheld a contrary principle: that although review of individual eligibility determinations in certain benefit programs may be confined by a state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court.

106 S.Ct. at 2530. This is just such a challenge. *See Ohio Bureau of Employment Services v. Hordory*, 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977); *Christian v. New York State Department of Labor*, 414 U.S. 64, 94 S.Ct. 747, 39 L.Ed.2d 38 (1974).

The defendants strive to recharacterize the plaintiffs' challenges to the state's administration of the EB and FSC programs as a mere request that the district court review several individual case histories and evaluate the practices of some individual agency personnel; we find the plaintiffs' claims to be far more broad-based. The plaintiffs are not suggesting that the state erred in its computation of benefits and that a few people came up a few dollars short. Rather, they seek a declaration that IDES administered the EB and FSC programs in contravention of federal law, and an injunction ordering IDES to readjudicate their claims properly. Although "[t]he statutory challenges raised here will no doubt affect the outcome of individual entitlement determinations if [the claimants] are successful on the merits of their suit ... this action does not directly seek [EB or FSC] benefits." *International*

Union, 106 S.Ct. 2530. In light of the Supreme Court's interpretation of section 2311(d), and the true nature of the plaintiffs' challenge, we believe that defendants' argument that 28 U.S.C. § 1331 is superseded by the less restrictive language in the EUC Act and the FSC Act is without merit. This is precisely the type of action for which federal review is appropriate.

B. Preemption

The state rules are not preempted by the federal statutes and regulations. "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51

L.Ed.2d 604 (1977)). Neither the EUC Act nor the FSC Act explicitly states an intention on the part of Congress to preempt the states' work search requirements.[2] Nor does the legislative history evince any such intent.

The federal requirements regarding acceptable work for unemployment claimants were adopted by Congress in 1977. Pub.L. 95-19, § 104, 91 Stat. 39, 40 (1977). Their purpose was to supplant (with respect to supplemental unemployment benefits) the existing state criteria that allowed claimants to "refuse jobs without losing their eligibil-

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[2] To the contrary, both the EUC Act and the FSC Act provide that except where inconsistent, state law is to apply to claims under each Act. *See supra* note 1. Similarly, GAL 5-77 (issued Dec. 21, 1976), for example, which provides "specific direction in the areas of eligibility review and reemployment assistance," also states that "policies and procedures vary to such an extent that it is not readily feasible to prescribe a straight line procedure for implementing th[at] program." This language suggests that states are to retain some discretion in their implementation of the federal programs.

ity to receive unemployment benefits" and require claimants "to take any reasonable job opportunity that is available." S.Rep. No. 67, 95th Cong., 1st Sess. 8-9, *reprinted in* 1977 U.S.Code Cong. & Admin.News 79, 85-86. In order to be able to take advantage of any reasonable job opportunity, a claimant must engage in a search for such work. The legislative history of the EUC Act (the requirements of which the DOL has interpreted to be applicable under the FSC Act as well) provides that "[e]xtended benefits would be denied to any individual for so long as he or she fails to engage in a systematic and sustained effort to obtain work and fails to provide tangible evidence to the State agency that he or she has engaged in such an effort." H.R.Conf.Rep. 1479, 96th Cong., 2d Sess. 164 (1980), U.S.Code Cong. & Admin.News 1980, pp. 5516, 5952. This history does not explain or add anything to the statutory language,

and fails to support plaintiffs' contention that the federal search requirements implicitly preempt the state rules and practice.

> The Supreme Court has held that
>
> [w]here the pre-emptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'"

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 747-48, 105 S.Ct. 2380, 2393-94, 85 L.Ed.2d 728 (1985) (citation omitted); *see also Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 720-22, 105 S.Ct. 2371, 2378-80, 85 L.Ed.2d 714 (1985). There is no such conflict here. The state has simply decided upon some

criteria to use in determining whether a claimant has engaged in an systematic and sustained search for work. Rather than conflict with the federal statutes, the state rules implement those laws.

The plaintiffs believe that the state rules are more stringent than the federal statutes and therefore conflict with the federal goal of

> protect[ing] workers still unemployed and unable to find jobs when their [regular] compensation ... is exhausted ... [by providing] additional unemployment compensation to people who are unemployed when unemployment is high and it is reasonable to expect that significant numbers of regularly employed people will be out of work for longer than normal periods.

S.Rep. No. 752, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code Cong. & Admin.News 3606,

3636. Congress also intended, however, to limit these benefits to claimants who actively seek work. By using its own criteria to evaluate claimants' work searches, the state is effectuating this intent.

Congress left administration of the unemployment statutes to a federal agency. *See Hillsborough County*, 471 U.S. at 721, 105 S.Ct. at 2379 (FDA has authority to preempt local legislation that imperils plasma supply). As the Supreme Court found in *Hillsborough County*,

> the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements. Thus, since the agency has not suggested that [state regulations] interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal....

Id. The plaintiffs have not provided us with this kind of strong evidence of interference or conflict. We therefore find that the federal statutes and regulations have not preempted the state work-search rules. We discuss the DOL's efforts to monitor the states' administration of the EB and FSC programs in more detail in the next section.

As for the requirement that states consider labor markets and available jobs in evaluating claimants' efforts to find work, the district court found, correctly, that GAL 21-81 "does not insist that the state take account of labor markets and job openings in any particular way." 625 F.Supp. at 635. Reviewers within IDES are able to develop a perspective through which they can understand hiring patterns within specific industries, and the fact that the claimants with whom they deal have already been unemployed for at least twenty-six weeks is silent testimony about

labor markets in the state. The federal defendants concede that IDES may have better implemented the federal statutes had it specifically considered relevant economic data in each individual case, and coordinated the Job Service and unemployment benefits divisions of IDES more effectively. The fact that IDES did less than the optimum, however, does not render it performance inconsistent with the federal requirements.

Similarly, the fact that IDES may make mistakes in applying its rules does not amount to a violation of federal law. Because IDES uses categorical rules, it encounters problems of misclassification of claimants, and because it relies on claimants' self-reporting, it sometimes finds discrepancies between what claimants say and what they actually do. The district court recognized these problems but found that "the statutes do not proscribe all potential sources of error." 625 F.Supp. at

636. Categorical rules, the court found, are a practical necessity. "There are hundreds of decision-makers within the IDES, and unless the disposition of an application for EB or FSC benefits is to turn on the identity of the decider, it is necessary to have some fairly simple rules." *Id*. The court compared IDES's rules to the rules the Secretary of Health and Human Services (HHS) uses in administering disability programs. The Supreme Court sustained HHS's medical-vocational guidelines in *Heckler v. Campbell*, 461 U.S. 458, 467, 103 S.Ct. 1952, 1957, 76 L.Ed.2d 66 91983) ("even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rule-making authority to determine issues that do not require case-by-case consideration"). The IDES's rules of thumb are just such an attempt to determine issues that need not be continuously redecided. It is simply more

efficient for IDES to decide only once that a claimant should be willing to accept a lower wage, to travel a certain distance, to work different hours, to contact a certain number of employers each week. It is not necessary, and, indeed, would cause unfairness through inconsistent results, for IDES to decide each of these issues individually for each claimant. The IDES must *apply* these rules individually, and the plaintiffs have not shown that it does not.

Self-reporting also is a practical necessity in order to administer programs the size of the EB and FSC programs.[3] The district court found that "[i]n 1983 there were 136,930 new claims for EB and 231,355 new claims for FSC benefits." 625 F.Supp. at 637. Although the total declined in 1984

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[3] Indeed, as plaintiffs concede, the statutory requirement that a claimant provide tangible evidence of his work search implies self-reporting.

to 110 new claims for EB and 116,263 new claims for FSC benefits, *id.*, each claim required biweekly evaluation by IDES staff members, and even as the number of new claims were declining, the continuous monitoring of existing claims was a time-consuming task. The IDES was justified, as the district court found, in accepting claimants' responses to its questions rather than attempting to arduous if not impossible task of independently investigating each claimant's efforts to obtain work. This is consistent with the federal requirements.

C. The DOL Letters

The DOL does not require states to use rules of thumb in their eligibility determinations. *See* Appendix. The GAL is general in its terms, referring to "systematic and sustained" searches for work, available jobs, and economic activity in the labor market. The rules of thumb are much more specific,

with objective requirements as to the number of employers a claimant must contact per week (at least five), the method of contact (personal), the wage a claimant must accept (usually minimum wage), the minimum time a claimant is willing to travel (one hour), and the shifts that a claimant is willing to work (more than just the day shift). The plaintiffs assert that the effect of the DOL letters was not an issue at trial; the district court, however, believed that it was, and found that the letters were not rules with binding legal force.

The district court characterized the plaintiffs' claim as a preemption argument: "the state uses one rule, the federal government requires another, and under the Supremacy Clause the federal rule prevails." 625 F.Supp. at 632. Because the DOL letters were not legally binding, however, according to the district court, the plaintiffs could not

rely on them in challenging the state procedures. *Id.* at 633.

The plaintiffs dispute this finding, which is essentially a question of law. They argue that the DOL letters are in fact binding regulations, despite the fact that they did not comply with the notice and comment requirements of the Administrative Procedure Act (APA).

For a regulation to have the "force and effect of law," it must create "substantive" or "legislative" rules, rather than merely suggest an interpretation of a statute. Additionally, the regulation must be promulgated in conformation "with any procedural requirements imposed by Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03, 99 S.Ct. 1705, 1717-18, 60 L.Ed.2d 208 (1979).

The defendants do not dispute that the DOL letters are substantive, legislative regulations. As the plaintiffs point out,

Congress has expressly authorized the Secretary of Labor to "make and publish ... rules and regulations" regarding unemployment insurance issues, and the letters in question were issued to implement the EUC Act and the FSC Act. 42 U.S.C. § 1302; *see also* 42 U.S.C. § 902. Another indication that the DOL letters are legislative is their breadth. The letters are directions to the states in their administration of the EB and FSC programs, and affect the claimants' substantive rights.

The defendants do dispute the plaintiffs' assertion that the DOL letters were issued in compliance with Congress' procedural requirements, specifically the requirement that rules be published for notice and comment under the (APA). That requirement, however, does not apply "to the extent there is involved ... a matter relating to ... public property, loans, grants, benefits, or con-

tracts." 5 U.S.C. § 553(a)(2). Unemployment insurance benefits are clearly public benefits, and FSC is paid pursuant to a contract between IDES and the DOL. *See* FSC Act § 602(a). This contract is a "public contract" within the meaning of 5 U.S.C. § 553(a)(2). *Cf. Brown v. Housing Authority*, 471 F.2d 63, 67-68 (7th Cir.1972). Thus Congress has not required notice and comment to give the DOL letters the force of law.

The DOL waived the "benefits" exception to the notice and comment provision, reimposing on itself the notice and comment rules. 29 C.F.R. § 2.7. This voluntary reimposition of the rules does not amount to a "procedural requirement imposed by Congress," *Chrysler Corp. v. Brown*, 441 U.S. at 303, 99 S.Ct. at 1718; Congress had exempted this type of program from the APA's requirements. The DOL therefore did not have to publish it letters for notice and comment to give them the force

of law. *Cubanski v. Heckler*, 781 F.2d 1421, 1428 (9th Cir.1986), *cert. granted sub nom. Bowen v. Kizer*, ___ U.S. ___, 107 S.Ct. 1282, 94 L.Ed.2d 141 (1987).

Federal agencies, however, are required to publish "substantive rules of general applicability" in the Federal Register, even if the rules are not first published for notice and comment. 5 U.S.C. § 552(a)(1)(D). The GAL on which the plaintiffs rely most heavily, GAL 21-81, was not published in the Federal Register. The APA provides an exception to the publication requirement if the persons subject to the rules are either "personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). The district court found that the state did not receive adequate notice of the DOL letters to permit the documents to be treated as regulations. 625 S.Supp. at 630. Testimony at trial demonstrated that

the DOL had begun circulating its letters in advance of their official issuance in 1982 or 1983, but that this was an unofficial practice and not uniformly followed. As the district court found, in some instances this practice was essential: One UIPL had in fact expired before its official date of issuance. The IDES employees who testified were uncertain as to when the GALs in question were received or by whom. One witness testified that the documents marked "advance copy" went to the regional offices of the DOL, but not necessarily to the state. We believe the district court was correct in finding that "the addresses of the GALs did not have the sort of personal service that would permit the documents to be treated as regulations in the absence of published notice and opportunity for comment." 625 F.Supp. at 630. Because GAL 21-81 was therefore not a binding

regulation,[4] the EUC Act and the FSC Act provide the only sources of authority, and unless the state's practices conflict with the statutes, they must be sustained. 625 F.Supp. at 633.

Although GAL 21-81, standing alone, is not a binding regulation on which the plaintiffs can base a challenge to the state's eligibility determinations, it is a binding construction of the EUC Act and the FSC Act between Illinois and the federal government pursuant to statute and contract. EUC Act § 201 et seq., 26 U.S.C. § 3304 note; FSC Act

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[4] The APA provides that "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register." 5 U.S.C. § 552(a)(1). GAL 2-83, which directs the reader to see UIPL 14-81, GAL 21-81, and GAL 21-82 regarding the work search requirements, was published at 47 Fed.Reg. 54706 (1982). Because of our doubts as to the "reasonable availability" of the DOL letters, this section of the APA does not change our holding that GAL 21-81 was not a binding regulation.

§ 601 et seq., 26 U.S.C. § 3304 note. The plaintiffs seek to rely on the contract, but because they are not parties to it, they can use the contract only if a private right of action as third-party beneficiaries is available to them. As the district court found, "[n]o statute creates such a right of action or otherwise grants rights to the plaintiffs, so ... they may not automatically use the contract as a basis of a judicial order against the state." 625 F.Supp. at 633 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979)).

In determining whether the plaintiffs may rely on a contract to which they were not parties, we look to whether the contract was made for the plaintiffs' benefit. If the contract was *intended* to benefit plaintiffs, they have enforceable rights. "If the agreement was not intended to benefit the

third party, however, he is viewed as an 'incidental' beneficiary, having no legally cognizable rights under the contract." *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir.1981). "The question is not whether the contracts would benefit the [plaintiffs], but whether the parties intended to confer an actionable right on the [plaintiffs]." *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1471, 1479 (7th Cir.1985). In other words, did the parties intend that the third party would have the right to sue in the event of a breach of contract? *Holbrook*, 643 F.2d at 1270 n. 17; *Price v. Pierce*, 823 F.2d 1114, 1121 (7th Cir.1987). The district court found that "[t]he plaintiffs may be the intended beneficiaries of the EB and FSC *programs*, but they are certainly not the intended beneficiaries of the *work search requirements*." 625 F.Supp. at 634 (emphasis in original). The EUC Act, the FSC Act, and GAL 21-81 serve the purpose

of putting limits on the states' administration of the EB and FSC programs. The work search rules are intended to assist state agencies in their determinations of whom to exclude from the program; they do not create rights in claimants. The federal government, which reimburses the states for their payments under the programs, benefits from the restrictions: the less people who receive payments, the less money the federal government must spend. We agree with the district court that "[i]t is not possible to draw enforceable rights in favor of claimants from the language of GAL 21-81." *Id.*

The DOL letters may be relied on as agency interpretations of the statutes to which some deference may be accorded, however, "'the courts have the reserve of power to substitute their own judgment on all questions of statutory interpretation.'" *Doe v. Reivitz*, 830 F.2d 1441, 1447 (7th Cir.1987)

(quoting 2 K. Davis, Administration Law Treatise § 7:11, at 55 (1979)). The EUC Act and the FSC Act call for claimants to make a "systematic and sustained" search for work. Although this is a phrase that is open to some interpretation, GAL 21-81 does not interpret it. The GAL is merely an elaboration on the statement, phrased in equally general terms. *See* Appendix. The GAL thus fails to provide us with an interpretation to which we can defer. The plaintiffs may not rely on the authority of the DOL letters in their challenge to IDES's administration of the EB and FSC programs.

D. The Social Security Act

The plaintiffs argue that instead of serving to make IDES more efficient, the rules of thumb actually hindered the state's eligibility determinations, slowing them down so much as to violate the "when due" provision of the Social Security Act. 42 U.S.C. §

503(a)(1).[5] This provision requires states to pay benefits "with the greatest promptness that is administratively feasible." 20 C.F.R. § 650.3(a); *Fusari v. Steinberg*, 419 U.S. 379, 387-88, 95 S.Ct. 533, 538-39, 41 L.Ed.2d 521 (1975)l *California Department of Human Resources Development v. Java*, 402 U.S. 121, 131, 91 S.Ct. 1347, 1354, 28 L.Ed.2d 666 (1971). Claimants receive prompt initial hearings before claims adjudicators, and the plaintiffs have not shown that subsequent delays were systematic or widespread. The court was presented only with anecdotal

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[5] 42 U.S.C. § 503(a) provides in part as follows:

> The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for --
>
> (i) such methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due....

evidence of delay in individual cases. "The plaintiffs did not introduce data on the average delay between the adjudicator's and the referee's hearings, however, and few claimants' cases reach this stage." 625 F.Supp. at 639. The court therefore concluded "that the Illinois system does not produce unacceptable delay." *Id.* The plaintiffs did not produce evidence to persuade us that this conclusion is erroneous. The plaintiffs suggest that if IDES had made sure that its Job Service personnel developed work search plans consistent with the GAL 21-81 factors and then transmitted copies of those plans from Job Service to the benefits determinations section of IDES, each claimant's work search could have been evaluated according to his plan, a result plaintiffs assert would have been more efficient. The plaintiffs do not suggest how this approach would better avoid delay, however. Examples of perhaps

isolated instances of delay and suggestions for alternative methods of administration are not enough to justify injunctive relief against the state. We find that the state did not fail to pay benefits "when due."

The plaintiffs also argue that the state violated the "fair hearing" clause of the Social Security Act.[6] "Whether the statutory 'fair hearing' requirement has been met is tested by the same standards as constitutional procedural due process." *Camacho v. Bowling*, 562 F.Supp. 1012, 1020 (N.D.Ill.1983) (citing *Ross v. Horn*, 598 F.2d 1312, 1318 n.4 (3d Cir.1979), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980)). If the state's procedures are consistent with the

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[6] 42 U.S.C. § 503(a)(3) requires a state to provide "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied."

Constitution, they will satisfy the requirements of the Social Security Act.

E. Due Process

The fourteenth amendment to the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property without due process of law." Because it is well-settled that claimants' receipt of unemployment insurance benefits is a property right, a state may not terminate these benefits without notice and an opportunity for a fair hearing. "[C]onstitutional due process requires notice that gives the [IDES's] reasons for its action in enough detail that a recipient can prepare a responsive defense." *Tripp v. Coler*, 640 F.Supp. 848, 857 (N.D.Ill.1986) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970); *Vargas v. Trainor*, 508 F.2d 485, 489 (7th Cir.1974), *cert. denied*, 420 U.S. 1008, 95 S.Ct. 1454,

43 L.Ed.2d 767 (1975)). "It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose -- and resembles more a scene from Kafka than a constitutional process." *Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C.Cir.1980). Parties must be notified in advance of the precise issues to be raised in the hearing. *In re Ruffalo*, 390 U.S. 544, 550-51, 88 S.Ct. 1222, 1225-26, 20 L.Ed.2d 117 (1968); *Navato v. Sletten*, 560 F.2d 340, 345-56 (8th Cir. 1977); *Camacho v. Bowling*, 562 F.Supp. 1012, 1020-22 (N.D.Ill.1983).

The district court found that the notices of claims adjudicator's interviews were "filled out in such a perfunctory fashion that the claimant could not know why he had been summoned." 625 F.Supp. at 625. The court, however, did not find this practice unlawful

because it found that the record was insufficient to permit it "to determine in what percentage of cases the form is filled out improperly." *Id.* In order to establish the state's liability under 42 U.S.C. § 1983, the plaintiffs had to show that IDES had a "custom or usage" of sending deficient notices. *See Monell v. Department of Social Services*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 870 (7th Cir.1983). "Informal actions, if they reflect a general policy, custom, or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally protected rights, may well satisfy the amorphous standards of § 1983." *Id.*; *Webster v. City of Houston*, 689 F.2d 1220, 1226 (5th Cir.-1982). It is also true, however, that

> the mere allegation of a single act of unconstitutional conduct by a municipal

> employee will not support the inference that such conduct was pursuant to official policies. On the other hand, where the plaintiff alleges a pattern or a series of incidents of unconstitutional conduct, then the courts have found an allegation of policy sufficient to withstand a dismissal motion.

Powe v. City of Chicago, 664 F.2d 639, 650 (7th Cir.1981). "'The frequency and pattern of the practice alleged to be a custom or usage must be sufficient to give rise to a reasonable inference that the public employer and its employees are aware that public employees engage in the practice and do so with impunity.'" *Webster*, 689 F.2d at 1226 (citing Schnapper, *Civil Rights Litigation After Monell*, 79 Colum.L.Rev. 213, 229 (1979)).

The parties stipulated that the sample of claims adjudicators' files was of a

sufficient size to draw ninety-five percent confident conclusions to within plus or minus three percent accuracy. Notices of claims adjudicators' interviews often were generated by computer. A list of computer-generated notices drawn from the sample claims shows that none of these notices told claimants that the issue of their interview would be whether they had impermissibly restricted their work search, and none informed claimants that they had violated a rule of thumb. Because of the parties' stipulation as to the accuracy of the conclusions drawn from the samples, it appears that none of the claimants who received computer-generated notices received adequate written notice as to the issues to be raised at the claims adjudicator's interview. The plaintiffs introduced evidence from which the district court could have found that from eighteen percent to twenty-four percent of the handwritten FSC notices were deficient,

and that twenty-two percent to twenty-eight percent of the handwritten EB notices were deficient.

There is no clear consensus among the courts as to what level of frequency of the challenged conduct evidences a custom, except that it must be more than one instance. It was not necessary for the district court to determine a precise percentage of deficient notices. The plaintiffs needed only to show, by a preponderance of the evidence, that the state had a custom of sending inadequate notices. Our finding that the computer-generated notices were deficient, combined with the examples of deficient handwritten notices and the testimony of one witness that "he was instructed by his superior to omit details in order to complete more notices per day," 625 F.Supp. at 639, are sufficient to establish custom. We find that the district court's statement as to the inadequacy of the

record to permit this conclusion is clearly erroneous.

The defendants assert that whatever deficiencies may have existed in the written notices were cured by appeal procedures available to claimants after they were denied benefits by the claims adjudicator. The district court found that because "a claimant in Illinois gets two oral hearings, and the deficient notices affect only the first" there was no constitutional notice problem. 625 F.Supp. at 639. Aside from the fact that the plaintiffs challenged both sets of notices, this position fails to recognize that notice should be provided "at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). The Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), outlines three factors for courts to consider when determining the requirements of due

process in various situations. These factors are

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903. The court in *Camacho v. Bowling*, 562 F.Supp. 1012 (N.D. Ill.1983), considered these three factors in the context of regular unemployment benefits. The court found, and we agree, that the significance of these benefits to claimants whose "source of steady income which supports

family, health, and home has disappeared ... cannot be overstated." *Id.* at 1024. The risk of erroneous deprivation is great here because, to the extent that claimants were not apprised of the rules of thumb, it is extremely unlikely that they would be able to correctly answer the hypothetical questions on the claimant questionnaires, or to modify their work searches accordingly. The state cannot be said to have an interest in depriving unwitting claimants of benefits to which they may be entitled, and the burden of modifying its procedures to give claimants adequate notice of the rules they have violated before they come before the claims adjudicator is slight. Considering all of these factors, we believe that due process requires the state to provide claimants with notice of exactly how their work searches have been inadequate *before* the claimants must face the claims adjudicators. As the district

court observed, "[e]veryone is entitled to know what he has supposedly done wrong, for otherwise he cannot make an intelligent presentation at a hearing." 625 F.Supp. at 638.

This requirement will be of little help to plaintiffs, however, unless they are also informed of IDES's rules of thumb at the outset of their work searches. *See Carey v. Quern*, 588 F.2d 230, 232 (7th Cir.1978). Although the district court found "the rules IDES uses are not secret," 625 F.Supp. at 638, this finding was based on the fact that the Board of Review's decisions, presumably applying the rules, are available to the public in a digest maintained by IDES. *Id.* at 626. The district court also found that IDES had a manual of benefits decisions containing "important decisions of the Board." *Id.* The digest did not exist during the operation of the EB and FSC programs. It was

not published until September, 1985, pursuant to the consent decree in *Welch v. Bowling*, 79 L. 16004 (Circuit Court of Cook County, May 14, 1984, *amended* May 30, 1985, *amended* Feb. 19, 1986). The basis of the complaint in *Welch* was that the digest's precursor, the manual of benefits decisions, had not been available to the public. *Id. Welch* settled before that issue could be resolved. The district court did not specifically find that the manual was available to the public, only that it existed. If the district court's finding that the IDES's rules are not secret is based on the belief that the digest was available during the times in question, the finding is clearly erroneous. And if it is based on the belief that claimants had access to the manual, then the finding has no support in the record. If the manual is indeed available to the public, the defendants should

be able to demonstrate its availability on remand.

The district court also found that IDES furnished claimants with "written notices of the general requirements of the program and supplie[d] oral explanations of the notices." 625 F.Supp. at 638. The written notices tell claimants to expand their work searches and accept any work paying more than minimum wage that is within their physical and mental abilities. The FSC notice tells claimants about the five-contracts-per-week rule. The EB notice does not. The court found that the notices told claimants what they needed to know "without a level of detail that might have made the forms even more difficult to comprehend than they are." *Id.* at 639. To the contrary, the notices only hinted at the requirements imposed by the five rules of thumb. It would have been no more difficult for IDES to set out a checklist of the rules

of thumb than it was for the state merely to allude to the requirements and trust the claimants to infer from the notices' general language five specific rules.

Although the EB and FSC notices advised claimants to relax their wage demands, shift preference, travel time and other job search restrictions, and to seek any work within their capabilities, the claimants were not told that they could be denied benefits if, for instance, they said they were willing to travel forty-five minutes instead of one hour.

The defendants argue that the programs' eligibility requirements were restated orally to claimants by IDES technicians, who were also willing to answer whatever questions claimants had. This argument is not supported by the record, however. One technician testified that he explained to claimants about travel time and shift requirements, but another testified that she offered no informa-

tion beyond that in the printed notice. A third technician initially testified that she gave claimants additional information, but she was impeached on cross-examination by her earlier deposition testimony.[7]

The district court's finding that some technicians "volunteered information beyond that on the notices," 625 F.Supp. at 639, was not clearly erroneous. The defendants, however, are misguided in their reliance on this finding to support their argument that IDES personnel cured whatever defects existed in the written notices as to claimants' responsibilities for their work searches. The defendants may be able to establish that claimants were adequately informed of the EB and FSC work search requirements; they will have the opportunity to do so on remand.

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[7] This technician repeated her direct testimony on cross-examination.

Because the plaintiffs argue that claimants received inadequate written and oral notice of their work search responsibilities, their position is that claimants have no knowledge of the requirements until they meet with a claims adjudicator, after they have completed two weeks of searching for work and submitted their questionnaires. The questionnaires referred to claimants' efforts in the preceding two weeks, and claimants could not change answer after they were submitted. Therefore, if a claimant's answers were "wrong," he lost benefits for those two weeks and became ineligible for future benefits.

The defendants argue that the EB and FSC programs were like regular benefits in that claimants would file an initial claim during the first two weeks of eligibility and have a benefit rights interview at that time. The defendants ask us to take judicial notice of an Illinois Department of Labor office

bulletin stating that claims adjudicators may not date a claim earlier than the first day of the week the claimant reports to file a claim. This bulletin, defendants assert, renders impossible the situation in which claimants learn of the rules when it is too late to do anything more to comply with them. We note in passing that this argument assumes that technicians at the benefit rights interviews inform claimants of the rules, which the defendants have not yet demonstrated. Although we decline to take judicial notice of this bulletin at this juncture, defendants will have an opportunity to argue this point on remand.

IV.

We find that plaintiffs at this stage of the trial have shown by a preponderance of the evidence that IDES violated their due process rights by failing to provide them with adequate notice of the work search rules of

thumb and th precise issues to be determined by the adjudicators. As we noted earlier, this failure to meet constitutional standards of due process also violates the "fair hearing" clause of the Social Security Act, 42 U.S.C. § 503(a)(3). Because the district court terminated the trial after the plaintiffs presented their case, we remand to give the defendants an opportunity to rebut the plaintiffs' evidence and for such other purposes as may be appropriate. The district court's rulings on the statutory issues (with the exception of those under the "fair hearing" clause of the Social Security Act) are affirmed. Circuit Rule 36 may not apply on remand but shall be at the option of the judge who presided at the trial. We also leave to the original trial judge's discretion, should he preside on remand, whether to resume the trial from the point at which it was ended, or rehear the plaintiffs'

evidence on the constitutional issues. In so holding we do not intend to convey any view as to the appropriate final outcome of this case after the trial is concluded.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR ADDITIONAL PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

APPENDIX

GAL 21-81, section III (issued May 12, 1981).

III. *EB Eligibility Requirements*

Under P.L.96-499 claimants must meet the following requirements:

A. *Active Search for Work*. An EB claimant is expected to make a more diligent and active search for work than would normally be required of an individual receiving regular benefits. To meet EB eligibility requirements the claimant's search for work must be "systematic and sustained." A "sustained" effort to obtain work is a continual effort maintained at length throughout each week.

Under the requirement to actively seek work, passive availability for work is not sufficient. A "systematic" effort to obtain work is a work search conducted with thoroughness and with a plan or methods to produce results. Registration with a referral union will be considered as partially meeting the active search for work requirements, but individual work search efforts will be required in every case to demonstrate an active search for work. SESAs shall advise all EB claimants of the work search requirements they must meet each week to demonstrate an active search for work. If there are no or few openings in an individual's customary occupation, he/she must broaden the types of work sought to meet the "active" search for work requirement even if the claimant's job prospects are classified as "good." The broadening of types of work sought to include work other than the claimant's highest skill or customary work

must be accompanied by a willingness by the claimant to lower his/her wage expectations. Claimants who restrict their job search to their customary occupation as a mere preference, not based upon physical or mental capability or conditions of the labor market, and by this limitation fail to maintain an active search for work will be ineligible for extended benefits for failing to actively seek work. In determining whether the individual has met the active search for work requirements, where the openings in an individual's customary occupation are few or nonexistent, the SESA shall consider:

a. Available Job -- hiring patterns

b. Economic Activity -- labor market

c. Claimant's Physical and Mental Ability

SESAs must monitor each EB claimant's continuing eligibility in light of the special active

search for work requirements. This monitoring can be done effectively through:

-- Eligibility Review Interviews

-- Development of work search plans specifying actions to be taken by claimants

-- Comparison of reported work search contacts with actions specified in work search plan

-- Evaluation of adequacy and appropriateness of work search contacts

-- Verification of work search contacts

States which either do not now require tangible evidence of an active search for work for each week claimed or which require only employer name, address and results, should modify procedures to ensure that "tangible evidence" of a "systematic and sustained" work search is provided by claimant. A record of the following information is both helpful to those searching for work and necessary to claims staff who must determine that the

claimant's search for work is "systematic" and "sustained."

1. Employer name and address

2. Method of contact (unions, ES referral, phone, in person, specify other)

3. Name of person contacted

4. Date of contact

5. Type of work sought

6. Result of contact

7. Was an application taken?

...

In determining the adequacy of work search information required of EB claimants, the adequacy of currently required information should be evaluated against the information specified above. As a minimum, it is recommended that the "tangible evidence" required to determine if a claimant's efforts are "systematic and sustained" include items 1 through 7.

Exception: An EB claimant who is in a State-approved training program during any week for which EB is claimed will be exempt from the work search requirements. This exception for such claimants accords with the requirements in Section 3304(a)(8), FUTA, which prohibits denial of benefits by reason of an active search for work requirement when the individual is in such a training program.

Claimants must provide "tangible evidence" of a "systematic and sustained" search for work during each week claimed. SESAs must establish standards based upon their knowledge of the labor market of what constitutes a "systematic and sustained" search for work for the various labor market areas within the State. The EB claimant's "tangible evidence," report of work search activities must be reviewed and screened for each week claimed in accordance with the established standards.

When the review and screening of an EB claimant's work search indicates possible ineligibility because of a failure to actively seek work, the claimant's eligibility must be determined under the EB actively seeking work provisions.

The amount of effort expended and the number of employer contacts required during a week to demonstrate a "systematic and sustained" effort to obtain work will vary by labor market areas within a State. The number of employers a claimant is expected to contact to show he/she is actively seeking work depends on many factors, such as the number of employers and employment opportunities in a local area, the geographical size of the local labor market and the availability of transportation.

Therefore, the forms and methods employed by States to obtain "tangible evidence" of a "systematic and sustained" search for work

must be designed with space for a sufficient number of entries of work search contacts to accommodate the variations in employment opportunities and size of the various local labor market within a State. States should design their report of work seeking activities form with space for the entry of the maximum number employer contacts required to demonstrate a "systematic and sustained" search for work in the largest labor market area in the State.

B. *Job Prospects Classification.* It is intended that EB claimants be considered differently than claimants of regular benefits because of the duration of their unemployment. When claimants file an initial claim for EB their prospects for obtaining work in their customary occupation shall be considered not good, unless they can furnish evidence satisfactory to the SESA that their prospects

for obtaining work within a reasonable short period (4 weeks) are good.

The SESA should advise each EB claimant whose prospects for reemployment are not good that he/she will be subject to EB suitable work provisions. Under the EB provisions any work which is within the individual's capabilities is considered suitable work.

C. *Referral for Job Placement*. All EB claimants whose job prospects have been determined to be "not good" must be referred immediately for registration and referral to any suitable jobs fitting the EB suitable work definition. EB claimants previously registered with the Job Service whose prospects are "not good" must have their registration updated to reflect EB status since EB suitable work provisions are applicable. SESAs must establish procedures for forwarding and exchanging information for the adjudication of EB claims issues regarding:

1. Refusal of job offers;
2. Refusal of referrals;
3. Able and Available issues;
4. Results to report and other issues;
5. Failure to report and other issues;

Such information must be documented and where appropriate accompanied with supportive evidence to assist the adjudication process.

D. *Failure to Apply for or Accept Suitable Work*. If a claimant determined to have good prospects of obtaining work in his/her customary occupation within a reasonably short period fails to apply for or accept suitable work, the claimant's eligibility to receive benefits would be determined according to the standards and criteria applied under the State law to determine eligibility for regular benefits.

When an individual's prospects of obtaining work in his/her customary occupation are classified not good and the individual has

refused to apply for or accept work which he/she is capable of performing, the suitability of the work will be determined according to the standards and criteria applicable to extended benefits.

If the individual's job prospects have been found to be *not good* and the individual has refused to accept or apply for work suitable under the EB provisions, the EB disqualification would be subject to the following restrictions:

1. The gross average weekly pay for the offered work must exceed the individual's weekly benefit amount, plus any supplemental unemployment benefits (SUB) payable.

2. The job must have been offered to the individual in writing or listed with the SESA.

3. The pay must equal or exceed the higher of the minimum wage under section

6(a)(1), the Fair Labor Standards Act of 1938, or any applicable State or local minimum wage.

4. The work must have been suitable under all suitable work provisions for regular benefits which do not conflict with the special EB provisions. Under this provision for example, the offered work must meet the labor standards requirements of the State law. If an individual fails to apply for or accept suitable work, he/she shall be ineligible to receive EB for the week in which such failure occurred and continuing for the duration of his/her unemployment until such time as the individual has worked in employment during at least 4 weeks and has earned not less than 4 times his/her weekly benefit amount and is determined to be otherwise eligible.

The question of whether an issue exists and whether determinations would be in order when claimants do not file claims for weeks during which they failed to apply for or accept an

offer of suitable work would be governed by applicable State law.

The following examples should provide guidance in resolving EB work refusal issues when the claimant's job prospects are "not good" and the regular benefit disqualification would not apply:

1. An individual will be disqualified from receiving EB if he/she refuses suitable work which was offered in writing or listed with the SESA.

2. An individual will be disqualified if he/she refuses a referral to a job by the SESA (listed) but not offered in writing by an employer provided the offer of a referral meets other conditions for imposing a disqualification.

3. An individual will be disqualified from receiving EB for refusing to accept a job offered in writing by an employer but which is not listed with the SESA.

4. An individual will not be disqualified from receiving EB for refusing a job which is neither offered in writing nor listed with the SESA.

E. *Eligibility Program (ER)*. It is expected that individuals who are in EB have been through eligibility review and will continue to receive intensified services in this program.

F. *Active Search for Work*. To be eligible for EB, claimants are required to actively seek work. When it is determined that an individual has not been actively seeking work during a week, the SESA shall issue a determination holding the individual ineligible to receive EB for such week and until the individual has had employment during at least 4 weeks and has received remuneration for such employment not less than 4 times the individual's weekly benefit amount.

A determination would not be required if the claimant does not file a claim for the week(s) during which he/she did not make an active search for work. However, the individual's eligibility should be carefully considered if the claim is reopened and the claimant files for subsequent weeks of unemployment.

The requirement that individuals "actively engage in seeking work" is applicable to all claimants with respect to each week of unemployment for which extended benefits are claimed after March 31, 1981. An individual who does not seek work during a week because he/she was unable to work or unavailable for work for some compelling or uncontrollable reason not related to active search, is subject to the requirement to "actively" seek work to the same extent as all other EB claimants. If the individual does not meet this requirement, the disqualification for

failing to actively engage in seeking work must be imposed.

The laws of some States provide that a claimant continues to be eligible if he is unavailable because of illness or disability occurring after filing a claim and registering for work if no offer of work that would have been suitable at the time of registration is refused after the beginning of such disability. Under such circumstances an individual in EB status must still make an active search for work and will be subject to a disqualification as specified above for failing to actively seek work.

G. *Requalification Following Disqualification*. An individual subject to a disqualification in connection with the benefit year of the parent claim or during a period of EB eligibility as the result of voluntarily leaving employment, discharge for misconduct or the refusal of suitable work will eligible

for EB only if the disqualification is lifted under State law provisions which require employment subsequent to the date of the disqualification.

Irving O. COSBY, et al., Plaintiffs,

v.

Sally WARD, et al., Defendants.

No. 83C3116.

United States District Court,
N.D. Illinois, E.D.

Dec. 30, 1985.

OPINION

EASTERBROOK, Circuit Judge.*

Illinois administers three programs of unemployment compensation. The first program, regular benefits, affords unemployed people compensation for 26 weeks, unless before then the total payments equal the insured wages during a base period. Illinois pays these benefits out of taxes collected from employers. Ill.Rev.Stat. ch. 48 §§ 300-820 (IUI Act). The second program, extended benefits or EB, becomes available if unemployment in

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* Of the Seventh Circuit, sitting by designation.

the state exceeds a trigger level. People who have exhausted regular benefits are eligible for extended benefits for up to 13 weeks, if they are available in the state at the time. This program is paid for from state funds, but the federal government reimburses the state for 50% of the cost of this program under § 204 of the Federal-State Compensation Act of 1970, 26 U.S.C. § 3304(a)(11) note (EUC Act). The third program, federal supplemental compensation (FSC), is designed for people who have exhausted eligibility for regular and extended benefits. The maximum period of benefits under the FSC program is between 10 and 26 weeks. The FSC program does not require a trigger, and the federal government pays all FSC benefits under the Federal Supplemental Compensation Act of 1982, 26 U.S.C. § 3304(a)(11) note (FSC Act). The federal government also compensates the states for administering the EB and FSC programs.

See 42 U.S.C. §§ 501, 502, and 1101(c)(1)(A), and § 604(c) of the FSC Act.

The federal money has strings attached. The state must follow requirements laid down in the federal statutes and the interpretations of these statutes by the Department of Labor. The state has signed a contract with the Department pledging to abide by the rules under the FSC program. One string requires claimants to search for work. People who claim EB must "actively engage in seeking work". EUC Act § 202(a)(3)(A)(ii), IUI Act § 409K(1)(b). This means that they must provide state agencies with "tangible evidence" that they have engaged in "a systematic and sustained effort to obtain work." EUC Act § 202(a)(3)(E)(i) and (ii). The FSC program uses the same standards. FSC Act § 602(d); IUI Act § 409K(5)(a). None of the statutes defines these terms.

This case is a class action challenging Illinois's administration of the requirement that claimants actively search for work. The plaintiffs are frustrated claimants and putative beneficiaries of the EB and FSC programs. The defendants include the state officials responsible for administering the programs of unemployment compensation, the United States Department of Labor, the Secretary of Labor for Employment and Training. Judge Marshall, to whom this case was initially assigned, certified classes of applicants for EB and FSC benefits. He also concludes that the court has jurisdiction. The defendants have renewed their jurisdictional objections, but the law of the case is otherwise.

The parties stipulated almost all of the important facts. I adopt all of the propositions of fact in the stipulation, which runs more than 80 pages. My opinion abbreviates

some of these facts, and to the extent compression produces inaccuracy the stipulation controls. The care with which the parties drafted the stipulation reduced the length of the trial. The plaintiffs presented evidence on October 15 and 16, 1985, concerning the implementation of the search requirement. The defendants' evidence would have consumed another two days, but I stopped the trial under Fed.R.Civ.P. 41(b), which provides that at the close of the plaintiff's case in a bench trial the judge "as trier of the facts may determine them and render judgment against the plaintiff." I gave an oral opinion explaining why the defendants were entitled to judgment. At the same time, however, I called for briefs on the question whether certain interpretative regulations of the Department of Labor bound the State of Illinois. I was prepared to resume the trial,

but the briefs did not upset my conclusion. Judgment will be entered for the defendants.

Part I of this opinion summarizes the stipulated facts and contains my findings of fact based on evidence at trial. I have exercised the privilege under Rule 41(b) to find the facts on the basis of the plaintiffs' case. A judge who heard from the defendants might find the facts differently, but because any change would be in defendants' direction this would not assist the plaintiffs. Part II discusses the plaintiffs' principal contention -- that the procedures used in Illinois violate federal law and the implementing letters circulated by the Department of Labor. Part III considers a series of constitutional arguments.

I.

1. A person claiming EB or FSC benefits in Illinois is entitled -- or condemned, depending on one's perspective -- to five

levels of review. After a person has exhausted his entitlement to regular benefits, a claims technician at the local office of the Illinois Department of Employment Security (IDES) informs the person of the possible availability of further benefits. The claims technician gives the person a notice, written in English, appropriate to the program in question and explains the meaning of the notice. Many claims technicians are multilingual, and each local office has claims technicians who speak the languages of the local population; these technicians will explain the requirements in Spanish or Polish even though the notices are in English. The claims technician supplies each person with forms that must be filled in every two weeks. The person must use the form (the claimant questionnaire) to report what he has done during the last two weeks to find work; the questionnaire also requires answers to

questions such as "[w]hat is the lowest starting wage you will accept?" and "[h] long (in time) are you willing to travel each way to work?".

If the applicant's questionnaire contains satisfactory answers, and if he otherwise is entitled to benefits (for example, if he has weeks of eligibility remaining), the claims technician sends the claim on for payment. If an answer on the questionnaire raises doubts about eligibility, the technician circles the answer. Another employee of the local office sends out a form requiring the claimant to appear in person at the local office for a meeting with a claims adjudicator. This notice is supposed to alert the claimant to the problem, but frequently it is filled out in such a perfunctory fashion that the claimant could not know why he had been summoned. (The record does not permit

me to determine in what percentage of cases the form is filled out improperly.)

The adjudicator discusses the questionnaire with the claimant, finding out whether the claimant understood the questions and answers. The adjudicator does not coach the claimant on which answers are acceptable and which are not, but as a rule the adjudicator will accept oral retractions of the written answers. If, for example, the claimant says that he will travel 30 minutes each way to work, the adjudicator may discover that the answer represented the claimant's actual travel time to his last job rather than the maximum time the claimant will travel. In that event the adjudicator will find out the real maximum time and use this in his decision. An adjudicator also will allow the claimant to return home to obtain additional documentation, if that should be necessary to prove the number of visits to employers

in search of work. At the end of the interview the adjudicator often obtains a brief written statement from the claimant concerning new and significant answers. The adjudicator renders an immediate written decision on the claimant's eligibility for benefits. The reasons are apt to be brief -- a handwritten "He unduly restricts his availability under the FSC program: 1/2 hr travel ea way & $5 hr min wage" (claim of Andres Hernandez) is a typical decision.

A person may appeal an adverse decision of the adjudicator to a referee. Referees are appointed and supervised by people outside the local offices, which ensures that quirks in the local structure do not influence their decisions. Referees are lawyers. Like claims technicians and claims adjudicators, referees receive training on the nature of the program and its eligibility criteria. The training materials of all three include copies of the

bulletins circulated by IDES. None of the decisionmakers remembers all of these bulletins -- no surprise, because the bulletins in the record are hundreds of pages long, and I am confident that the parties have spared me hundreds of pages more on EB, FSC, and the many other programs the IDES administers. All of the technicians, adjudicators, and referees who testified were familiar with the general principles in the bulletins, even if they could not recall seeing a particular bulletin.

The claimant is entitled to file written reasons for the appeal, and the referee meets personally with the claimant. The referee will review the questionnaire with the claimant and again elicit the meaning of the answers. The claimant is entitled to present evidence, and the hearing is recorded. If the referee does not speak the claimant's language, the IDES provides an interpreter.

The referee makes a new determination; he is not bound in any way by the adjudicator's findings and decision. The appeal ends in another written decision, typically prepared the day of the interview. This is more formal than the adjudicator's opinion. In the case of Andres Hernandez, the referee's opinion is a little more than a page of single-spaced typing, containing a capsule history of the case, findings of fact, and conclusions. The referee's conclusion was:

> Based on the record as a whole, the Referee finds that the Claimant has not made an active, systematic and sustained search for work as required, by the Federal Supplemental Compensation Act. An active, systematic and sustained search for work is shown if: (1.) The Claimant conducts a work search for at least 3 days in a week resulting in at least 5 employer contacts. (2) The

> Claimant relaxes restrictions with respect to type of work, hours, rate of pay, and travel time and distance, and (3) the Claimant keeps a record of his efforts to find work e.g. indicating the name dates of contact and results. The Claimant failed to comply with (1), (2) and (3) of the aforementioned requirements. The Claimant failed to keep a credible record of his contacts for the period September 12, 1982 through September 18, 1982. Further there is no evidence to suggest that the Claimant contacted five (5) employers in at least 3 days of the weeks. The Claimant's forms indicate he was looking for work near his home.

If the referee affirms the denial of benefits, the applicant's next stop is the Board of Review. This is an administrative court within the IDES. The disappointed

claimant may file written protests and briefs, personally or by counsel, arguing all legal and factual questions. The Board renders a written decision based on the record made before the referee. In the case of Andres Hernandez, the Board stated the facts and then affirmed on a single ground: "In the case before us, the evidence shows that the claimant conducted his work search on three days of the second week of the period under review. The evidence does not show that the claimant conducted a work search during any other portion of the period under review. Under such circumstances, the claimant's work search was not active, systematic, or sustained as required by the Federal Supplemental Compensation Act." The board's decisions are not systematically published, but IDES maintains for itself and the public a digest of the Board's precedents. There is also a

manual of benefits decisions, which contains important decisions of the Board.

A person who is disappointed successively by claims technicians, claims adjudicator, referee, and Board may obtain review in the state courts. Ill.Rev.Stat. ch. 48 § 520, ch. 110 § 301 *et seq*. The plaintiffs have not challenged the adequacy of this review. By the time an unemployed person can obtain judicial review, however, the four levels of administrative review will have consumed many months.

IDES has an "Economic Information and Analysis Unit" that collects and disseminates information about labor markets in Illinois. It publishes a monthly newsletter with data on the state as a whole and selected cities and counties; quarterly publications supply information about smaller areas. But the Unit does not determine whether there are openings in particular occupations, and none of the

technicians, adjudicators, and referees who testified made any use of the data disseminated by the Unit.

The technicians, adjudicators, and referees also disregard the work of the Job Service, an agency that helps unemployed people find work. A claimant must register with the Job Service to be eligible for any form of unemployment compensation, and the claimant proposes to the Job Service a plan of search for new work. Counsellors at the Job Service, who should know where there may be openings for a person of the claimant's skills, assist in formulating the plan. But the counsellors at the Job Service do not ensure that plans comply with the work search rules administered by the unemployment offices, the people deciding whether to award benefits do not often see these plans, and compliance with a plan approved by the Job

Service will not assure eligibility for EB or FSC benefits.

The adjudicators, referees, and Board all try to determine whether the claimant met the requirement of active work search for work during the two weeks covered by the questionnaire. If the person did not, the IDES denies benefits even if it is convinced that the claimant will make an adequate search in a subsequent period. The denial, in turn, triggers a waiting period. Once a person has had a claim for an week rejected, he must find work and earn at least his average weekly benefit for four weeks before his is again eligible for unemployment benefits.

2. The EUC Act and the FSC Act require Illinois to limit EB and FSC benefits to people actively seeking work. The IDES has issued several bulletins to its staff (including the claims technicians, adjudicators, and referees). The principal bulletin concerning

the work search requirement of the EB program is Bulletin No. 1467, Supplement No. 1, issued August 20, 1981. This reproduces § 409 of the IUI Act, which among other things defines "suitable work" for EB purposes as "any work which is within [the claimant's] capabilities", provided that the gross average weekly wage must exceed the higher of the minimum wage and the amount of unemployment benefits to which the claimant would be entitled. The EUC Act requires a "systematic" and "sustained" search; Bulletin No. 1467 defines systematic as an effort "conducted with thoroughness and with a plan or method designed to produce results." It defines sustained as "a continual week-to-week effort maintained for whatever period of time [is] necessary to obtain work. Passive availability for work (merely registering with the Job Service, making telephone calls, looking for want ads, etc.) only without a continued

active effort to find work is not sufficient." The Bulletin defines two levels of prospects: "good," meaning that the claimant already has a job on which he is to start (or be recalled to work) within four weeks, and "not good," meaning every other situation. If a person's prospects are "not good," he must accept "[a]ny work which is within [his] physical and mental capabilities" provided that the wage is at least the legal minimum or the amount he could receive as benefits. The Bulletin continues (in section D):

> Due to the EB claimant's prolonged period of unemployment, it is intended that he be required to make a more diligent effort to seek work than would normally be required of an individual receiving regular benefits. Accordingly, the weekly eligibility of each EB claimant must be monitored in light of the special requirements concerning search for

work.... All EB claimants must be advised of the work search requirements that they must meet each week.... It is expected that the EB claimant's efforts to find work should increase because of the duration of his unemployment.

If there are no or few openings in the claimant's customary occupation, he must broaden the types of work sought to meet the active search for work requirement. Claimants who restrict their job search to their customary occupation, or who have other restrictions (i.e., wages, hours, travel, etc.) not based upon physical or mental capability, and by these restrictions fail to maintain an active systematic search for work, may be ineligible for extended benefits.

In determining whether the individual has met the active search for work

requirement, where openings in the individual's customary occupation are few or nonexistent, the following areas shall be considered.

a. Available Jobs -- Hiring pattern

b. Economic Activity -- Labor market

c. Claimant's physical and mental activity

...

The level of economic activity in the labor market area and the kinds of work available are important factors in determining whether a systematic and sustained work seeking effort is being made. Eligibility Review Program and Job Service information and any job counseling interviews as well as the results of aptitude testing would be pertinent.

The requirements of Bulletin No. 1467 are reflected in the form that claims technicians give to all applicants for extended benefits. This form tells claimants, among other things:

> ... You are expected to relax your restrictions with respect to the type of work you will accept, hours, rate of pay, travel time, etc. (for example: A senior accountant would be required to accept work as a junior accountant or bookkeeper, etc.) ... If there are no or few openings in your regular occupation, you are expected to seek any work within your physical and mental capabilities for which you have the background to perform. You must keep a record of your efforts to find work that include the following information:....

> You may use your usual methods of contacting potential employers (in-person contacts, registration with private employment agencies, reporting to your union as required, answering or placing want ads, resumes, telephone calls, etc.,). However, your work search must include some independent work search efforts each week.
>
> If you are not able to conduct an active search for work during a week due to compelling circumstances, you will be held ineligible only if you claim. It is your responsibility to inform the local office that you are not claiming a week for this reason.
>
> .... If you do not have a definite prospect of return to work in 4 weeks or less, your job prospect classification is "not good". If your classification is "not good", any work that is within

your physical and mental capabilities that you have the background to perform is suitable, provided that ... the gross average weekly wage exceeds your weekly benefit amount (plus any supplemental unemployment benefits paid to you by a former employer)....

If you fail to conduct an active search for work or you refuse to apply for or to accept suitable work ... you will be held ineligible for Extended Benefits for the week in which such failure occurred and for each week thereafter until you have worked in at least 4 weeks with earning in each week, which when totaled, equals at least 4 times your weekly benefit amount.

The EB program has been "off" in Illinois more than it has been "on." When the EB program is "off," or when it is "on" and a claimant's benefits are exhausted, the FSC

program is next in line. The principal instructions for the implementation of the FSC program are in Bulletin No. 1519 and its supplements. The original Bulletin No. 1519, dated September 15, 1982, simply states that the FSC program requires the claimant to seek work actively; no subsequent bulletin spells this out, but no bulletin suggests that the requirement has a different meaning than it does under the EB program.

The IDES wrote two notices for claimants under the FSC program. Only the second, which has been used since February 17, 1983, is now important. This handout lays down severe requirements for seeking work:

(1) On each normal working day you must do something positive to find work.

(2) .... You must make work contacts on at least 3 days per week, resulting in at least 5 employer contacts per week. This may mean looking for work beyond

your normal commuting distance as well as increasing one-way travel time. You are expected to lower your salary demands, even to the minimum wage, if there are no prospects of finding work in your customary occupation.

(3) If there is any day on which you made no employer contacts, you must indicate on the form what positive effort you made that day to find work, for example, preparing a resume, contacting a union or a professional organization, attending an employment seminar, etc.

(4) If your prospects for obtaining work in your usual occupation are poor (that is, if you do not have a *definite* offer to begin work within four weeks ...), you will be expected to accept any offer of suitable work that is listed with the State Job Service or offered in writing. Any work will be considered suitable if

you are reasonably fitted by training and experience to perform the work or if the necessary training is provided when you lack the required skills.

To be suitable, the gross pay of any work offered must exceed your weekly benefit amount plus any Supplemental Unemployment Benefits (SUB) you receive form your former employer, or the State or Federal minimum wage, whichever is greater.

The law provides for the denial of FSC to anyone who does not observe the above requirements. The disqualification will continue until the person has worked in at least four weeks and earned not less than four times his or her weekly benefit amount.

Neither the bulletins nor the notices establish bright-line rules other than the three day -- five contract rule in the notice given to FSC claimants and the wage rule that

is part of the definition of "suitable" work. A substantial part of the plaintiffs' argument is that the IDES nonetheless used rules of thumb. On the basis of the plaintiffs' evidence, I conclude that the IDES did this. (A caveat, repeated for the last time: defendants' evidence may have put this in a different light.)

Many technicians, adjudicators, and referees testified that they used some rules of thumb. Claims technicians routinely flagged any questionnaire on which the claimant did not answer at least one hour to the question asking for maximum one-way travel time. If the claimant limited his search to day shift work (sometimes even to day and evening shifts), that too was flagged. Any wage significantly over the minimum was flagged, as was any search for employment other than by personal visits to employers' places of business. If subsequent questioning

by an adjudicator or referee revealed that the claimant indeed would not travel, say, more than 45 minutes each way to work, or would not work the evening shift, that led to a conclusion that the claimant had not engaged in an adequate search for work.

The adjudicators and referees testified that these rules of thumb were not absolute necessities. For example, if the claimant was seeking work as a lawyer, he would be allowed to use the methods of seeking work customary in the occupation; walk-in visits would not be required. But the witnesses apparently relaxed their presumptive rules but rarely. I have reviewed many of the files contained in the record, and case after case contains notations like those in the Hernandez file -- claim denied because of a limitation on travel time such as 1/2 hour, or a demand for $5 per hour in wages.

The plaintiffs also established that the adjudicators and referees do not go behind the claimants' answers. That is, if the claimant, when asked, said that he would not take a job for less than $5 per hour, the referee would accept that as accurate. There are other ways to determine what wage the claimant demanded. The referee might, for example, look at the applications for employment the claimants filled out, to determine what wage they wrote down. Or if the referee knew that the claimant had applied for a particular job at a particular plant, the referee might find out the wage of that job. Similarly, the referee might find out how long it would take the claimant to reach a particular place at which he had applied for work. Neither adjudicators nor referees pursued such collateral methods of determining the restrictions the claimants placed on their search for work. Some decisionmakers testified that

they could figure these matters out from their knowledge of Chicago's geography and labor market, but none testified that he did this regularly.

Finally, the plaintiffs established that the decisionmakers at the IDES do not regularly use any systematic information about the labor market or job openings. They do not know which occupations have "few or no openings"; they do not know anything systematic about levels of economic activity. This is not to say that they know nothing. The decisionmakers testified, and I find, that they could deduce much from the people who come before them. By recalling the occupations of the claimants, they can tell which occupations seem to be producing a lot of unemployment. Similarly, they can tell much about the "prospects" of an applicant, and about conditions in his occupations, by determining how long the applicant has been

unemployed. If one steelworker has been unemployed for 50 weeks, this says a great deal. The decisionmakers at the IDES see a parade of claimants and can draw astute inferences even though they do not study data prepared by professional students of labor markets.

My finding that the decisionmakers at the IDES do not use any systematic information about job openings in particular occupations, or about levels of economic activity, is limited to the kind of cases discussed at trial. The principal use of these data is in evaluating claimants with "good" prospects, who are free to restrict their search for work in certain ways, and people who may have mental or physical restrictions. None of the evidence at trial concerned claimants with "good" prospects or with handicaps of any sort.

The plaintiffs also established that the local offices of the IDES were not entirely consistent in the administration of the programs. Shortly after the beginning of the FSC program the supervisor of one office made it clear that the adjudicators and claims technicians were not to be liberal in granting benefits, and he held a follow-up meeting to drive the point home. Technicians and adjudicators from this office who testified stated that they interpreted the directive as one to hold the claimants to their answers on the questionnaire, to ask no leading questions (that is, not to hint that the questions may have been misunderstood and that other answers may be more helpful), and to apply mechanical rules (such as a minimum travel time of one hour each way). These people also testified, however, that they followed the rules in the IDES bulletins; they complied with their supervisor's wishes by

beady-eyed adherence to the rules, an effective bureaucratic technique. Within two months the supervisor at this office reversed field and said that too many claims were being denied; the staff then stopped being so strict. This incident plays no role in my decision. The plaintiffs want injunctive relief. An incident of this character does not inform the appropriate operation of the unemployment system in the future, for any system is open to misunderstanding, overbearing supervisors, and other human foibles. The differences among offices, other than this single incident, are insignificant. Moreover, the referees of IDES answer to different supervisors, so the claimants at this office could have had de novo review by other officials of the IDES.

3. The United States Department of Labor administers the EUC Act and the FSC Act for the federal government. The statutes do

not grant the Department any particular powers, but it must assess state programs to see whether they comply with the statutes (and therefore whether the states should be reimbursed). The EUC Act requires states to enact statutes containing the federal rules; § 409 of the IUI Act complies with that requirement. The FSC Act contemplates contractual arrangements between states and the federal government. Illinois and the Department signed such a contract in September 1982. The state promised among other things to "perform all of the functions and duties ... in accordance with the [FSC] Act as interpreted by the Secretary of the Department of Labor."

The Department has not promulgated any regulations concerning the administration of the two acts. It has offered plenty of advice, however, in the form of "general administration letters" (GALs) and "unimploy-

ment insurance program letters" (UIPLs). These documents are addressed to "all state employment security agencies." They are sometimes published in the Federal Register, but they are not regulations because they are not circulated for notice and comment before adoption by the Department. The Department occasionally makes advanced copies of the GALs available to state agencies, but his practice apparently is designed to give extra notice rather than to elicit comments. One UIPL in the record expired before its official date of issuance, so the practice of "advance" circulation may be essential. At all events, I conclude that the addressees of the GALs did not have the sort of personal service that would permit the documents to be treated as regulations in the absence of published notice and opportunity for comment. 5 U.S.C. § 553(b).

The most recent missive concerning the FSC program is UIPL 7-84, published at 49 Fed.Reg. 4271 (Feb. 3, 1984). This lays down requirements for each state to follow, and its treatment of the seeking work requirement is terse. It simply restates the requirement that people actively seek work and provide tangible evidence that they have done so. 49 Fed.Reg. 4275-76. If this is the Department's controlling word, it is no guidance at all. An earlier GAL, however, was more informative. GAL 2-83, issued November 2, 1982, and published at 47 Fed.Reg. 54706 (Dec. 3, 1982), states that the seeking work requirement under the FSC Act is the same as that under the EUC Act. GAL 2-83 as the definitive word on the FSC Act, and I shall do likewise.

GALs 21-81 and 22-81 are apparently unpublished. GAL 22-81 is a question-and-answer sheet explaining GAL 21-81. So the

only authoritative construction of the seeking work requirement turns out to be GAL 21-81, which was not circulated for advance comment, let alone published. Pages 8-13 of GAL 21-81 describe the requirement in terms similar to those in the IDES's bulletins. Because the text of GAL 21-81 is not published anywhere, I set out the more important language from Part III:

> A. *Active Search for Work.* An EB claimant is expected to make a more diligent and active search for work than would normally be required of an individual receiving regular benefits. To meet EB eligibility requirements the claimant's search must be "systematic and sustained." ... [P]assive availability for work is not sufficient....
>
> ...
>
> If there are no or few openings in an individual's customary occupation, he/she

must broaden the types of work sought to meet the "active" search for work requirement even if the claimant's job prospects are classified as "good." The broadening of types of work sought to include work other than the claimant's highest skill or customary work must be accompanied by a willingness by the claimant to lower his/her wage expectations. Claimants who restrict their job search to their customary occupation as a mere preference, not based upon physical or mental capability or conditions of the labor market, and by this limitation fail to maintain an active search for work will be ineligible for benefits for failing to actively seek work. In determining whether the individual has met the active search for work requirements, where the openings in an individual's customary occupation

are few or nonexistent, the SESA [state employment agency] shall consider:

a. Available Jobs -- hiring patterns

b. Economic Activity -- labor market

c. Claimant's Physical and Mental Ability

SESAs must monitor each EB claimant's continuing eligibility in light of the special active search for work requirements. This monitoring can be done effectively through:

-- Eligibility Review Interviews

-- Development of work search plans specifying actions to be taken by claimants

-- Comparison of reported work search contacts with actions specified in work search plan

-- Evaluation of adequacy and appropriateness of work search contacts

-- Verification of work search requirements

States which either do not now require tangible evidence of an active search for work for each week claimed or which require only employer name, address, and results, should modify procedures to ensure that "tangible evidence" of a "systematic and sustained" work search is provided by the claimant....

....

... SESAs must establish standards based upon their knowledge of the labor market of what constitutes a "systematic and sustained" search for work for the various labor market areas within the State....

....

The amount of effort expended and the number of employer contacts required during a week to demonstrate a "systematic and sustained" effort to find work will vary by labor market areas within a State. The number of employers a claimant is expected to contact to show he/she is actively seeking work depends on many factors, such as the number of employers and employment opportunities in a local area, the geographical size of the local labor market and the availability of transportation.

....

B. *Job Prospects Classification*.... When claimants file an initial claim for EB their prospects for obtaining work in their customary occupation shall be considered not good.... The SESA should advise each EB claimant whose prospects for reemployment are not good that he/she

will be subject to EB suitable work provisions. Under the EB provisions any work which is within the individual's capabilities is considered suitable work.

....

D. *Failure to Apply for or Accept Suitable Work*.... If the individual's job prospects have been found to be *not good* and the individual has refused to accept or apply for work suitable under the EB provisions, the EB disqualification would be subject to the following restrictions:

1. The gross weekly pay for the offered work must exceed the individual's weekly benefit amount, plus any supplemental unemployment benefits (SUB) payable.

2. The job must have been offered to the individual in writing or listed with the SESA.

3. The pay must equal or exceed the higher of the minimum wage under section 6(a)(1), the Fair Labor Standards Act of 1938, or any applicable state or local minimum wage.

These requirements were the basis of the bulletins and notices the IDES issued concerning the EB and FSC programs. Gregory Ramel, who wrote or supervised the preparation of the IDES bulletins, so testified. The plaintiffs nonetheless say that the IDES has not complied with the federal directives, and that these directives preempt the rules the IDES has been using in practice. I turn to that argument.

II

The plaintiffs' claims are based on differences between GAL 21-81 and the Illinois practice, as I have found the IDES to administer the programs. Illinois uses rules of thumb such as the requirement to contact five

employers during three days of the week, the minimum time a person is willing to travel, and the shifts on which the person is willing to work. GAL 21-81 does not suggest the use of all of these mechanical rules, although it does support the requirement that each claimant reduce his wage demand to the greater of the minimum wage or the weekly benefit amount. The GAL talks about "economic activity," "available jobs," and differences in the nature of labor markets; the Illinois bulletin mentions these things, but in practice the decisionmakers do not use them systematically. Finally, GAL 21-81 requires states to notify claimants of the requirements, and the plaintiffs say that the notices the IDES uses are not adequate. The plaintiffs insist that each difference makes the Illinois system defective.

The plaintiffs cast this as a simple preemption argument: the state uses one rule,

the federal government requires another, and under the Supremacy Clause the federal rule prevails. Federal regulations, like federal laws, preempt conflicting state laws and practices. *Jones v. Rath Packing Co.*, 430 U.S. 519, 536, 97 S.Ct. 1305, 1315, 51 L.Ed.2d 604 (1977); *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962). But not all pronouncements by federal agencies have the same weight. A regulation carries the force of law only if it implements power delegated to the agency and complies with the notices and comment requirements of the Administrative Procedure Act. *Chrysler Corp. v. Brown*, 441 U.S. 281, 312-16, 99 S.Ct. 1705, 1723-25, 60 L.Ed.2d 208 (1979); cf. *Production Tool Corp. v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir.1982). A statement adopted with less formality may be persuasive; interpretative rules announcing the position of the responsible agency about

the meaning of a statute should be respected unless plainly mistaken. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 562-70, 100 S.Ct. 790, 795-99, 63 L.Ed.2d 22 (1980); *Industrial Holographics, Inc. v. Donovan*, 722 F.2d 1362, 1366 n. 6 (7th Cir.1983); *Smith v. Miller*, 665 F.2d 172, 179 & n. 7 (7th Cir.1981; but see *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 105-07 (1st Cir.1984). In the absence of a binding regulation, however, the statute alone is the source of authority, and unless the state's position conflicts with the statute it must be sustained.

GAL 21-81 is not a regulation. It has not been published, let alone published for comment in advance of its adoption. It therefore lacks the force of law. Now the plaintiffs say that I am forbidden to reach this conclusion. Until I raised the issue on the eve of trial, all of the parties

assumed that GAL 21-81 is a binding regulation, and the pretrial order does not list the status of GAL 21-81 as an issue for decision. The defendants' inattention to the nature of the GAL may have prevented them from raising the issue belatedly, but it does not stop the court from doing so. *Jahnke Construction Co. v. Vulcan Materials Co.*, 527 F.2d 772 (7th Cir.1976). Cf. Fed.R.Civ.P. 16(e); *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 153 (7th Cir.1981); *Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 620-21 (7th Cir.1976). I have been asked to issue an injunction substantially altering the way Illinois administers the EB and FSC programs. The supposed source of authority for this injunction is GAL 21-81. Because GAL 21-81 is not a regulation, it supplied no authority for anything, and it would be a misuse of the power of the court to direct a state to change its conduct just because

the lawyers for the defendants neglected to inquire into the status of GAL 21-81.

GAL 21-81 applies to the EB program, but its rules have been adopted for the FSC program as well, and Illinois has promised by contract to follow the Department of Labor's standards for the FSC program. The contract therefore makes GAL 21-81 a binding construction of the FSC Act between Illinois and the federal government. The plaintiffs seek to take advantage of this contract, but they are not parties to it. Plaintiffs may use the contract only if there is a private right of action in favor of third party beneficiaries to contracts of this sort. No statute creates such a right of action or otherwise grants rights to the plaintiffs, so under cases such as *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), they may not automatically

use the contract as a basis of a judicial order against the state.

D'Amato v. Wisconsin Gas Co., 760 F.2d 1474 (7th Cir.1985), holds that people claiming rights as third party beneficiaries under a contract between the federal government and some other entity must establish at a minimum that they are the principal beneficiaries of the contract. See also *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir.1981). People who are simply affected by a contract -- "incidental beneficiaries" in the argot -- may not use it as the basis of relief against the signatories. Even the intended beneficiary must establish, as in any other case involving implied private rights of action, that Congress meant to make the entitlement enforceable in court. *D'Amato, supra*, 760 F.2d at 1479-80. *D'Amato* held that a handicapped person may not enforce a clause in a contract, required by a federal statute, that

requires employers to have affirmative action programs for the handicapped.

The plaintiffs try to avoid *D'Amato* by contenting that they are the intended beneficiaries of the EB and FSC programs. This was true of the handicapped plaintiff in *D'Amato*, too, but at all events the plaintiffs are not especial beneficiaries of GAL 21-81. The plaintiffs may be the intended beneficiaries of the EB and FSC *programs*, but they are certainly not the intended beneficiaries of the *work search requirements*. The two statutes, as well as GAL 21-81, are designed to compel states to tighten up the administration of the unemployment programs, to deny benefits to people whose search for work was sufficient to qualify for regular benefits but not sufficient to qualify for extended benefits. The principles contained in GAL 21-81 are for the benefit of the federal government, which pays 50% of EB and 100% of

FSC benefits; the Department of Labor wanted to ensure that states were not too liberal with federal money. The statements in GAL 21-81 are not rules so much as they are grounds on which the federal government may choose to question the states' administration of the program. It is not possible to draw enforceable rights in favor of claimants from the language of GAL 21-81.

There remains the possibility that GAL 21-81 is a persuasive interpretation of the statutes, which directly preempt the practices now being used in Illinois. The statute requires a "systematic and sustained effort to obtain work" without suggesting that there is only one way to define "systematic and sustained". The GAL does not purport to construe the statutes or to lay down exclusive rules. It is a set of principles telling state agencies to be more restrictive and suggesting what may be restrictive enough.

A federal statute preempts state rules only if there is an irreconcilable conflict, and there is a presumption against conflict. E.g., *Jones v. Rath Packing, supra; Hillsborough County v. Automated Medical Laboratories, Inc.*, ___ U.S. ___, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985); *Metropolitan Life Ins. Co. v. Massachusetts*, ___ U.S. ___, 105 S.Ct. 2380, 2388-89, 85 L.Ed.2d 728 (1985). The statutes do not define "systematic and sustained;" GAL 21-81 does not give an exclusive definition or preempt any different approaches that may be equally effective in protecting the federal interests. The statutes are, after all, programs of cooperative federalism, and Congress almost always gives the states some leeway in programs of this sort.

The legislative history of the work search clauses does not suggest any rigid requirement. For example, the entire legisla-

tive history of the search requirement in the current version of the EUC Act is: "Extended benefits would be denied to any individual for so long as he or she fails to engage in a systematic and sustained effort to obtain work and fails to provide tangible evidence to the State Agency that he or she has engaged in such an effort." H.R.Conf.Rep. 96-1479, 96th Cong., 2d Sess. 164 (1980). This just repeats the language of the statute. It does not suggest that the search requirement creates any particular rights -- indeed any rights -- in favor of claimants.

The Department of Labor apparently is satisfied with the IDES's administration of the EB and FSC programs. It is a defendant, not a plaintiff. It has never suggested that Illinois is out of compliance with the GALs. Although the Department has also never suggested just what GAL 21-81 means, it has taken the position that the GAL does not mean

what plaintiffs think it does. Its brief asserts both that each applicant must formulate his own plan for searching and that a state agency need not make written determinations concerning the availability of work. "The logic behind not requiring such a written determination is simple. The fact that an individual has applied for EB or FSC is sufficient reason to believe that there are no or few openings in that individual's customary occupation." This, too, is a position a court must respect. Who knows better than the Department of Labor whether Illinois is in compliance with the Department's GALs? *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217, 89 L.Ed 1700 (1945).

The Department may not adopt a silly construction of its rules, but it has not done

this. GAL 21-81 requires states to notify claimants of the work search rule; Illinois does this. Claims technicians give notices to the claimants and explain them orally. The notices give adequate warning that the requirements are strict, even though they do not mention each rule of thumb. Illinois insists that claimants expand their search by increasing the distance they will travel and the times they will work, and by reducing the wage they demand. The GAL does not forbid any of these; it probably requires them.

The GAL does not insist that the state take account of labor markets and job openings in any particular way. Take "hiring patterns" as an example. Perhaps the pattern in an industry is to hire those who apply in person for the night shift, and as the employee accumulates seniority he can move to a more favorable shift. A person who applies by telephone rather than in person, or who

insists on avoiding the night shift, is not being realistic. He is unemployed by choice, and, because the unemployment system assists only the involuntarily unemployed, the IDES may cut him off. An adjudicator can understand many things about hiring patterns without the benefit of formal, written determinations. The decisionmakers in Illinois use their understanding when acting, and nothing in the GAL suggests that the state must use professionally-developed statistics or written determinations as the sole base of decisions.

To the extent the plaintiffs rely directly on the statutes, rather than on GAL 21-81, they cannot prevail. The statutes require Illinois to tighten the standards; it did; the statutes do not establish how tight is too tight. The state's approach is consistent with the purpose of an enhanced work-search requirement. Regular benefits

last 26 weeks. If a person is unemployed at the end of 26 weeks, then (i) there is very little work in the economy the person can do; (ii) the person has not been seriously trying to find a job; or (iii) he has been too picky about what work he will do. The EUC Act and the FSC Act condition the award of further benefits on the claimant's willingness to look harder and be less choosy. The approach the IDES has adopted follows the path Congress has marked. True it is that this slights the possibility that (i) rather than (ii) or (iii) is the source of the unemployment, but Congress has decided to require people to search harder even if that turns out to be pointless at times.

By the time a person has been unemployed 26 weeks, he ought to be willing to accept a much lower wage, perhaps as low as the legal minimum; Illinois requires this. He ought to be willing to travel farther to work or

accept a job at odd hours; Illinois requires this. He ought to contact many employers; Illinois requires this too. Illinois achieves all of these things by bright-line rules, to which the plaintiffs object. But the statutes say nothing about the choice between bright-line rules and other approaches.

Illinois might be in trouble if it applied these rules to people with "good" job prospects or with physical or mental handicaps that made exhaustive searches for work either impossible or exceedingly unlikely to be rewarding. A sensible construction of the statutes would relax the search requirement for such people, and GAL 21-81 suggests as much. Knowledge of job prospects, economic activity, and the labor market would help to tailor a search requirement to the circumstances of these unusual claimants. But none of the evidence in this case concerns people

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whose prospects are "good" or who have physical or mental handicaps.

The IDES was entitled to require people who have not found work in their own occupations in 26 weeks of searching while on regular benefits to expand their occupational and geographic searches, to increase the number of applications for employment (and for many jobs no application other than a personal one if effective), and to reduce the minimum wages they will accept. The fact that they have not found work in 26 weeks or more is all the information about labor markets the state needs in most cases.

The plaintiffs protest that Illinois has taken a blunderbuss approach. Its rules of thumb disregard differences among applicants and occupations. When the decisionmaker accepts the claimant's verbal report about the time he will travel or the wage he will accept, this increases the risk of error.

Someone who has in fact sought work at 70-minute commute from home may think erroneously that the time is 45 minutes, and if he reports this as the maximum time he may be disqualified. Someone who answers $7 to the question "what is the lowest wage you will accept?" may mean to say only that $7 is the wage he would like to get; this person may have applied for jobs paying the minimum wage. So there are two sorts of problems in approach the IDES has taken -- the problems associated with categorical rules that may misclassify some applicants, and the problems associated with acting on what the claimants say rather than on what they do. Both are potential sources of error.

Yet the statutes do not proscribe all potential sources of error. Categorical rules are mainstays of the legal system, whether in tax law, see *United States v. Boyle*, ___ U.S. ___, 105 S.Ct. 687, 692, 83 L.Ed.2d 622

(1985), or in social welfare programs, see *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983). So is self-reporting. Almost every federal program relies on applicants' answers to questions, and rarely will the agency go behind these answers to see whether the applicant understood the significance of what he said. More often the agency tries to find out whether the applicant answered truthfully, a particular problem in tax and means-tested programs when the applicant has a tendency to share the truth in favor of his financial interests. The IDES, too, rationally could think that a claimant is more likely to overstate the distance he will travel to a job than to understate it.

Categorical rules and self-reporting may be essential to the administration of any large scale program. There are hundreds of decisionmakers within the IDES, and unless

the disposition of an application for EB or FSC benefits is to turn on the identity of the decider, it is necessary to have some fairly simple rules. The Secretary of Health and Human Services uses categorical rules in administering federal disability programs, and the Supreme Court sustained one set of them in *Heckler v. Campbell, supra*. See also *Stephens v. Heckler*, 766 F.2d 284, 285-86 (7th Cir.1985); *Garrison v. Heckler*, 765 F.2d 710, 714 (7th Cir.1985). To coordinate the acts of hundreds of decisionmakers there must be rules; rules must have sharp edges to be effective; all rules with sharp edges also create a risk of error. But the IDES is entitled to decide that these errors are less serious, on balance, than the errors that would be created by the unstructured decisions of hundreds of uncoordinated employees.

The IDES has a particularly difficult task because of the cyclical nature of

unemployment. The EB and FSC programs become important only when there is substantial, extended unemployment. As the number of unemployed people increases, the IDES must hire more employees to process their claims. These employees must be trained quickly -- and they must be trained in several programs, each of which requires difficult decisions. Work search issues are a small fraction of the questions. Did the applicant quit? Was he fired? If he was fired, was that for cause? Did the applicant have enough weeks of covered employment to be eligible? What is the appropriate level of benefits? These and many more confront the staff every two weeks. Unlike programs of disability insurance, in which one decision will establish entitlement for an indefinite period, each decision under the unemployment program fixes eligibility for two weeks at best. Most unemployment comes to an end before benefits

run out. The claimant must seek work continuously. If he is in the minority that does not find work, then every two weeks he submits a new form, and the process begins anew.

From 1980 through 1984 the IDES handled 666,309 claims for EB and 414,534 claims for FSC benefits. These are "new claims;" that is, each claim initiates a process entailing many decisions. (Some people created more than one new claim. A person who received FSC benefits after EB ran out would be two "new claims," and if he then got a job, worked for long enough, and once more became unemployed, he could create "new claims" for EB and FSC in turn.) Every claim requires many decisions, at least one every two weeks. And all this is on top of claims for regular benefits.

Like unemployment, the flow of applications is cyclical. In 1983 there were 136,930 new claims for EB and 231,355 new claims for

FSC benefits. In 1984, however, there were only 110 new claims for EB and 116,263 new claims for FSC benefits. As the number of claims wound down, the IDES reduced the size of its staff. A significant number of the witnesses at trial, once employed by the IDES, had been laid off; the more prosperous the economy, the fewer unemployment claims adjudicators. It is impossible to see how the IDES could have made bi-weekly decisions concerning the 368,000 new claims for extended benefits in 1983 without self-reporting and rules of thumb. Only by accepting the claimant's answers, for example, could an adjudicator proceed with anything like dispatch. If, for example, the adjudicator had to determine the actual travel time between the claimant's home and each place to which the claimant had applied for work, each adjudication would have consumed an inordinate amount of time. Nothing in the

EUC Act, the FSC Act, or the legislative history of either suggests that Congress meant to forbid the use of categorical rules or reliance on claimants' answers.

For completeness I add that categorical rules do not violate 42 U.S.C. § 503(a)(3), on which the plaintiffs also rely. This provision, a portion of the Social Security Act, is applicable to unemployment cases by reference in the EUC Act and the FSC Act. It assures a fair hearing, but this is a matter of procedure rather than of the substantive content of the rules. See *Ross v. Horn*, 598 F.2d 1312, 1318 n. 4 (3d Cir.-1979), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980). Claimants are entitled to two oral hearings, one before the adjudicator and the other before the referee. The second, a de novo inquiry, is recorded and if necessary transcribed. Interpreters are provided if they are necessary. The

Supreme Court has allowed other claims subject to this statute to be adjudicated largely on paper, see *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), and the IDES's procedures are more than sufficient.

III

The constitutional arguments are almost the reverse of the statutory claims. The plaintiffs maintain that Illinois does not have ascertainable standards for the award of benefits. I take this not as a claim that the state lacks standards -- after all, the plaintiffs complain loudly about the standards the state uses -- but as a claim that the applicants do not have adequate information about the standards. Plaintiffs think that the state should establish a work search plan for each applicant and then simply determine whether the applicant did what he was supposed

to do. This would make it unnecessary for applicants to be concerned about the legal principles underlying the definition of an acceptable plan.

The plaintiffs may well be right that Illinois should implement this approach as a matter of wise administration, but the Constitution does not require it. The due process clause of the fourteenth amendment, on which plaintiffs rely, certainly does not require the state to inform its residents of all rules of law that may be applicable to them. Even in criminal law, to which the ex post facto and cruel and unusual punishments clauses apply, a state may insist that residents take the initiative in learning and following the law. See *Rose v. Locke*, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975); but cf. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 83 L.Ed.2d 758 (1962). A state may not have a body of secret law, see *Carey*

v. *Quern*, 588 F.2d 230, 232 (7th Cir.1978), but the rules IDES uses are not secret. The Board's opinions are digested, and anyone may consult the opinions of the Board and the state courts that sit in review of the Board's decisions. The most the plaintiffs can say is that the rules Illinois uses are complex and shifting. Part of the system of rules is mechanical (the one requiring work contacts at least three days per week, with a minimum of five contacts per week), and part is flexible (the one requiring contacts to be in person unless the customary way of searching for jobs in the occupation is another method).

The state does not give each applicant a compendium of rules, but neither does the state inform each citizen exactly what he must do to avoid being held liable for torts or breaches of contract. Uncertainty is an attribute of any common law system. The bar

synthesizes and transmits to those affected the important features of the legal system. No one knows the exact meaning of "negligence;" often a judicial decision many years after the fact will surprise people who relied on earlier cases. Illinois has adopted a system with some of the features of the common law for determining what is an adequate search for work. Any such system takes some people by surprise. The Supreme Court had held, nevertheless, that administrative agencies may use adjudication rather than rulemaking to adopt and alter their rules of decision. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 49 L.Ed.2d 429 (1974); *NLRB v. Bell Aerospace*, 416 U.S,. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 132 (1974); *CSC v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2280, 37 L.Ed.2d 796 (1973). See also, e.g., *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (7th Cir.1983) (en banc). A system of adjudication implies less than

perfect notice -- and it puts on the applicant the onus of compliance. Social welfare systems may do this, however, and if the applicant cannot show his entitlement to benefits he may be excluded. *Lavine v. Milne*, 424 U.S. 477, 96 S.Ct. 1010, 47 L.Ed.2d 249 (1976); *Dozier v. Loop College*, 776 F.2d 752 (7th Cir.1985).

The plaintiffs rely heavily on *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), and the many other cases that require states to give a person notice of the charges against him before they may cut off welfare, disability, and related benefits. Everyone is entitled to know what he has supposedly done wrong, for otherwise he cannot make an intelligent presentation at a hearing. This does not imply, however, that the state must give all applicants a comprehensive notice of the requirements of the program. Again consider the criminal law.

A person must receive an indictment or information before being tried, but this does not imply that the state must give everyone a copy of the criminal code (and the judicial decisions in interpreting it) before he commits a crime. Quite the contrary, judicial opinions may by themselves be sufficient notice of the effect of a law. *Rose v. Locke, supra*.

Illinois has not left applicants in the dark, however. It both furnishes written notices of the general requirements of the program and supplies oral explanations of the notices. The written notices explicitly warn applicants to expand their search for work and to take any "suitable" work -- which the notices define as any work paying more than the minimum wage (or the level of unemployment benefits) within the claimants' physical and mental abilities. The FSC notice explicitly sets out the rule requiring five contacts per

week. The EB notice does not, but this does not make it defective. It too suggests a great expansion of search. A diligent claimant does something every day to find work. Even one contact a day will produce compliance. The claimant questionnaire has ten lines to be filled in with job contacts, implying that the IDES wants at least that number for each two weeks. Indeed, given the explicit demand for a thorough search, most claimants should be surprised to find that five contacts a week spread over three days would suffice. Neither notice demands that contacts be "personal," but the decisionmakers testified that this was required only in occupations that traditionally hire by personal application.

The notices contain enough to let the claimants know that they had to make their applications reasonably effective -- that is, they had to apply in the way people are hired

for the kind of work people without seniority are assigned to do. This should be plain enough to an unemployed person -- especially one told by the notice that "suitable" work means *any* work -- without a level of detail that might have made the forms even more difficult to comprehend than they are. Those who did not get the picture from the notices could have asked the claims technicians; the technicians who testified said that they answered questions asked of them, and some said that they volunteered information beyond that on the notices.

The notice given to those whose benefits are in jeopardy of termination is governed by *Goldberg*, but the IDES uses a form that is supposed to be filled out with a statement of reasons. I found in Part I that this is not always done. One witness even testified that he was instructed by his superior to omit details in order to complete more notices per

day. I do not believe, however, that this is a ground for the sort of injunction the plaintiffs seek.

First, isolated errors are best dealt with through the administrative tribunals that are in place. An injunction forbidding error in the administration of a social welfare program is not a very useful injunction; error will be with us always. Notice is *already* required. An injunction would not change the governing rule. An injunction may correct a systematic refusal to follow statutory or constitutional commands, but the misguided directives of particular supervisors in some local offices of a large bureaucracy do not require this sort of relief, even if some individual notices do not meet constitutional standards. Every system of hearings misfires, and it may misfire frequently. The reversal rate in the social security disability system is quite striking, see *Mathews v. Eldridge*,

supra, 424 U.S. at 346, 96 S.Ct. at 908, yet the system is nonetheless constitutional.

Second, a claimant in Illinois gets two oral hearings, and the deficient notices affect only the first. Even if the claimant does not know why he has been summoned to meet the claims adjudicator, the adjudicator renders a written decision that provides notice of the deficiencies, and the claimant may use this notice in preparing for a hearing before the referee. The referee's hearing is de novo, so the claimant suffers no prejudice; indeed, a dry run before the claims adjudicator may be an excellent form of notice. The two stages of hearings may produce delay, and delay is to be avoided in unemployment cases. *California v. Java*, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971). The plaintiffs did not introduce data on the average delay between the adjudicator's and the referee's hearings, however, and few

claimants' cases reach this stage. Most misunderstandings, even those produced by inadequate notices, are cleared up by the adjudicators, who allow claimants to obtain additional evidence from home if the brief notice impaired their ability to present a case. I therefore conclude that the Illinois system does not produce unacceptable delay. See also *Lavine v. Milne, supra*.

The last two constitutional arguments require little discussion. The plaintiffs say that the rules the IDES uses are not rationally related to the purposes of a requirement that claimants actively seek work. The discussion so far in this opinion is sufficient to demonstrate that they are. The plaintiffs also insist that the notices to IDES uses are defective because they are in English, while some people speak other languages (Spanish and Polish were mentioned most often at trial).

Other courts have held that neither the constitution nor the pertinent statute requires notice in any language other than English. *Carmona v. Sheffield*, 475 F.2d 738 (7th Cir.1973); *Hernandez v. Department of Labor*, 83 Ill.2d 512, 48 Ill.Dec.232, 4167 N.E.2d 263 (1981). I need not reach the abstract question, however, because the evidence does not demonstrate that any claimant failed to receive effective notice. No claimant testified, and therefore none said that the failed to receive benefits because he did not understand the notice. Claims technicians testified that they gave advice to applicants in whatever language the applicants preferred to speak. Offices of the IDES evidently have employees who speak all of the languages preferred by people who use those offices. The record contains evidence of multi-lingual claims technicians and adjudicators, and the use of interpreters

by referees; no one testified that at any office of the IDES there are not enough employees who speak languages other than English.

Indeed, there is not even evidence that a significant number of applicants do not understand English. One claims technician testified that at Local Office 9 she spoke Spanish with 90% of the people who came to her and Polish with another 5%, but she also said that she used whatever language the claimant preferred to speak; she did not try to determine whether particular people were unable to understand English. There was also evidently a selection bias -- others in the office sent to this witness claimants who preferred to speak Spanish. Altogether, then, I find that the plaintiffs have not established that any applicant for benefits failed to receive effective notice of the requirements of the EB and FSC programs because of

language difficulties. This makes further pursuit of the constitutional question unnecessary. (To the extent the language claim is based on GAL 21-81, which says that written notices "should" be made available in languages other than English, it fails not only because GAL 21-81 does not create legal rights enforceable by claimants but also because this passage is hortatory at best.)

IV

My rejection of the regulatory, statutory and constitutional arguments does not imply that Illinois should receive a medal for it administration of the statutes. The record is full of slipshod performances by employees of the IDES. Supervisory employees of the IDES testified that many claims were handled poorly and disagreed with the reasons given by adjudicators and referees. The failure of the IDES to write clearer and more complete notices, and to have them available in Spanish

and Polish, is baffling. The state has not explained why it could not better coordinate the work of the Job Service and the unemployment offices -- though since I ended the trial before the state put on any evidence, I can hardly blame it for a shortfall of explanation.

The state has no interest in denying benefits to eligible people. The incentive cuts the other way -- because EB is 50% and FSC 100% federal finding, the Department of Labor has been worried that states will be too enthusiastic in handing out federal money. This is a principal reason why I have held that GAL 21-81 does not create rights in favor of claimants. The state has no reason to be stingy; administrators of the EB and FSC programs do not need a court to egg them on to greater generosity; that incentive is built in; there are here no discrete and insular minorities in need of help. Why the state

has chosen to be so tight-fisted with someone else's money is hard to fathom. It is entitled to be stingy, however. The plaintiffs' remedies lie in administrative and judicial correction of mistakes in particular cases and political correction of the general approach the IDES has taken.

The clerk will enter judgment for the defendants.

(3)

No. 91-577

Supreme Court, U.S.
FILED
OCT 7 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BONITA PASCHAL, DANIEL DODSON, PAUL BUCASAS and all others similarly situated,

Petitioners,

v.

LOLETA DIDRICKSON, the Director of the Illinois Department of Employment Security; STELLA CUTHBERT, the Commissioner of the Illinois Department of Employment Security; LYNN MARTIN, the Secretary of the United States Department of Labor; ROBERTS T. JONES, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX VOLUME II TO THE PETITION FOR WRIT OF CERTIORARI

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26 § 3301

§ 3301. Rate of tax

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to

(1) 6.2 percent in the case of calendar years 1988, 1989 and 1990; or

(1) 6.0 percent in the case of calendar year 1991 and each calendar year thereafter; of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

§ 3302. Credits against tax

(a) **Contributions to state unemployment funds. --**

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contribu-

tions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified as provided in section 3304 for the 12-month period ending on October 31, of such year.

(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 6071 to file a return for such year; except that credit shall be permitted for contributions paid after such last day, but such credit shall not exceed 90 percent of the amount which would have been allowable as credit on

account of such contributions had they been paid on or before such last day.

(4) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation law of the State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another unemployment compensation law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been

made on the date the return for the taxable year was filed under section 6071.

(5) In the case of wages paid by the trustee of an estate under title 11 of the United States Code, if the failure to pay contributions on time was without fault by the trustee, paragraph (3) shall be applied by substituting "100 percent" for "90 percent".

(b) **Additional credit.** -- In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 3301 for any taxable year an amount, with respect to the unemployment compensation law of each State certified as provided in section 3303 for the 12-month period ending on October 31 of such year, or with respect to any provisions thereof so certified, equal to the amount, if any, by which the contributions required to be paid

by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in such 12-month period to any person having individuals in his employ, or to a rate of 5.4 percent, whichever rate is lower.

(c) **Limit on total credits.**--

(1) The total credits allowed to a taxpayer under this section shall not exceed 90 percent of the tax against which such credits are allowable.

(2) If an advance or advances have been made to the unemployment account of a State under title XII of the Social Security Act, then the total credits (after applying subsections (a) and (b) and paragraph (1) of this subsection) otherwise allowable under this section

for the taxable year in the case of a taxpayer subject to the unemployment compensation law of such State shall be reduced --

(A)(i) in the case of a taxable year beginning with the second consecutive January 1 as of the beginning of which there is a balance of such advances, by 5 percent of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State; and

(ii) in the case of any succeeding taxable year beginning with a consecutive January 1 as of the beginning of which there is a balance of such advances, by an additional 5 percent, for each such succeeding taxable year, of the tax

imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State;

(B) in the case of a taxable year beginning with the third or fourth consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any), multiplied by a fraction, the numerator of which is the State's average annual wage in covered employment for the calendar year in which the determination is made and the denominator

of which is the wage base under this chapter, by which--

(i) 2.7 percent multiplied by a fraction, the numerator of which is the wage base under this chapter and the denominator of which is the estimated United States average annual wage in covered employment for the calendar year in which the determination is to be made, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year; and

(C) in case of a taxable year beginning with the fifth or any succeeding consecutive January 1 as of the beginning of which there

is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which--

(i) the 5-year benefit cost rate applicable to such State for such taxable year or (if higher) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year.

The provisions of the preceding sentence shall not be applicable with respect to the taxable year beginning January 1, 1975, or any succeeding taxable year which begins before January 1, 1980; and, for the purposes of such sentence, January 1, 1980, shall be deemed to be

the first January 1 occurring after January 1, 1974, and consecutive taxable years in the period commencing January 1, 1980, shall be determined as if the taxable year which begins on January 1, 1980, were the taxable year immediately succeeding the taxable year which began on January 1, 1974. Subparagraph (C) shall not apply with respect to any taxable year to which it would otherwise apply (but subparagraph (B) shall apply to such taxable year) if the Secretary of Labor determines (on or before November 10 of such taxable year) that the State meets the requirements of subsection (f)(2)(B) for such taxable year.

(3) If the Secretary of Labor determines that a State, or State agency, has not-

(A) entered into the agreement described in section 239 of the Trade Act of 1974, with the Secretary of Labor before July 15, 1975, or

(B) fulfilled its commitments under an agreement with the Secretary of Labor as described in section 239 of the Trade Act of 1974,

then, in the case of a taxpayer subject to the unemployment compensation law of such State, the total credits (after applying subsections (a) and (b) and paragraphs (1) and (2) of the section) otherwise allowable under this section for a year during which such State or agency does not enter into or fulfill such an agreement shall be reduced by 7-1/2 percent of the tax imposed with respect to wages paid by such taxpayer

during such year which are attributable to such State.

(d) **Definitions and special rules relating to subsection (c).** --

(1) **Rate of tax deemed to be 6 percent.**-In applying subsection (c), the tax imposed by section 3301 shall be computed at the rate of 6 percent in lieu of the rate provided by such section.

(2) **Wages attributable to a particular State.**- For purposes of subsection (c), wages shall be attributable to a particular State if they are subject to the unemployment compensation law of the State, or (if not subject to the unemployment compensation law of any State) if they are determined (under rules or regulations prescribed by the Secretary) to be attributable to such State.

(3) **Additional taxes inapplicable where advances are repaid before November 10**

of taxable year.- Paragraph (2) of subsection (c) shall not apply with respect to any State for the taxable year if (as of the beginning of November 10 of such year) there is no balance of advances referred to in such paragraph.

(4) **Average employer contribution rate.**-For purposes of subparagraphs (B) and (C) of subsection (c)(2), the average employer contribution rate for any State for any calendar year is that percentage obtained by dividing-

(A) the total of the contributions paid into the State unemployment fund with respect to such calendar year, by

(B)(i) for purposes of subparagraph (B) of subsection (c)(2), the total of the wages (as determined without any limitation on amount) attributable to such State subject

to contributions under this chapter with respect to such calendar year, and

(ii) for purposes of subparagraph (C) of subsection (c)(2), the total of the remuneration subject to contributions under the State unemployment compensation law with respect to such calendar year.

For purposes of subparagraph (C) of subsection (c)(2), if the average employer contribution rate for any State for any calendar year (determined without regard to this sentence) equals or exceeds 2.7 percent, such rate shall be determined by increasing the amount taken into account under subparagraph (A) of the preceding sentence by the aggregate amount of employee payments (if any) into the unemployment fund of such State with respect to such calendar year which are

to be used solely in the payment of unemployment compensation,

(5) **5-year benefit cost rate.-** For purposes of subparagraph (C) of subsection (c)(2), the 5-year benefit cost rate applicable to any State for any taxable year is that percentage obtained by dividing-

(A) one-fifth of the total of the compensation paid under the State unemployment compensation law during the 5-year period ending at the close of the second calendar year preceding such taxable year, by

(B) the total of the remuneration subject to contributions under the State unemployment compensation law with respect to the first calendar preceding such taxable year.

(6) **Rounding.-** If any percentage referred to in either subparagraph (B) or (C) of subsection (c)(2) is not a multiple of .1 percent, it shall be rounded to the nearest multiple of .1 percent.

(7) **Determination and certification of percentages.-** The percentage referred to in subsection (c)(2)(B) or (C) for any taxable year for any State having a balance referred to therein shall be determined by the Secretary of Labor, and shall be certified by him to the Secretary of the Treasury before June 1 of such year, on the basis of a report furnished by such State to the Secretary of Labor before May 1 of such year. Any such State report shall be made as of the close of March 31 of the taxable year, and shall be made on such forms, and shall contain such information, as

the Secretary of Labor deems necessary to the performance of his duties under this section.

(e) **Successor employer.-** Subject to the limits provided by subsection (c), if-

(1) an employer acquires during any calendar year substantially all the property used in the trade or business of another person, or used in a separate unit of a trade or business of such other person, and immediately after the acquisition employs in his trade or business one or more individuals who immediately prior to the acquisition were employed in the trade or business of such other person, and

(2) such other person is not an employer for the calendar year in which the acquisition takes place,

then, for the calendar year in which the acquisition takes place, in addition to the

credits allowed under subsections (a) and (b), such employer may credit against the tax imposed by section 3301 for such year an amount equal to the credits which (without regard to subsection (c)) would have been allowable to such other person under subsections (a) and (b) and this subsection for such year, if such other person had been an employer, with respect to remuneration subject to contributions under the unemployment compensation law of a State paid by such other person to the individual or individuals described in paragraph (1).

(f) **Limitation on credit reduction.-**

(1) **Limitation.-** In the case of any State which meets the requirements of paragraph (2) with respect to any taxable year the reduction under subsection (c)(2) in credits otherwise applicable to taxpayers subject to the unemployment

compensation law of such State shall not exceed the greater of-

(A) the reduction which was in effect with respect to such State under subsection (c)(2) for the preceding taxable year, or

(B) 0.6 percent of the wages paid by the taxpayer during such taxable year which are attributable to such State.

(2) **Requirements.-** The requirements of this paragraph are met by any State with respect to any taxable year if the Secretary of Labor determines (on or before November 10 of such taxable year) that-

(A) no State action was taken during the 12-month period ending on September 30 of such taxable year (excluding any action required under State law as in effect prior

to the date of the enactment of this subsection) which has resulted or will result in a reduction in such State's unemployment tax effort (as defined by the Secretary of Labor in regulations),

(B) no State action was taken during the 12-month period ending on September 30 of such taxable year (excluding any action required under State law as in effect prior to the date of the enactment of this subsection) which has resulted or will result in a net decrease in the solvency of the State unemployment compensation system (as defined by the Secretary of Labor in regulations),

(C) the State unemployment tax rate for the taxable year equals or exceeds the average benefit cost

ratio for calendar years in the 5-calendar year period ending with the last calendar year before the taxable year, and

(D) the outstanding balance of such State of advances under title XII of the Social Security Act on September 30 of such taxable year was not greater than the outstanding balance for such State of such advances on September 30 of the third preceding taxable year (or, for purposes of applying this subparagraph to taxable year 1983, September 30, 1981).

The requirements of subparagraphs (C) and (D) shall not apply to taxable years 1981 and 1982.

(3) **Credit reductions for subsequent years.-** If the credit reduction under subsection (c)(2) is limited by reason

of paragraph (1) of this subsection for any taxable year, for purposes of applying subsection (c)(2) to subsequent taxable years (including years after 1987), the taxable year for which the credit reduction was so limited (and January 1 thereof) shall not be taken into account.

(4) **State unemployment tax rate.-** For purposes of this subsection-

(A) **In general.-** The State unemployment tax rate for any taxable year is the percentage obtained by dividing-

(i) the total amount of contributions paid into the State unemployment fund with respect to such taxable year, by

(ii) the total amount of the remuneration subject to con-

tributions under the State unemployment compensation law with respect to such taxable year (determined without regard to any limitation on the amount of wages subject to contribution under the State law).

(B) **Treatment of additional tax under this chapter.-**

(i) **Taxable year 1983.-** In the case of taxable year 1983, any additional tax imposed under this chapter with respect to any State by reason of subsection (c)(2) shall be treated as contributions paid into the State unemployment fund with respect to such taxable year.

(ii) **Taxable year 1984.**- In the case of taxable year 1984, any additional tax imposed under this chapter with respect to any State by reason of subsection (c)(2) shall (to the extent such additional tax is attributable to a credit reduction in excess of 0.6 of wages attributable to such State) be treated as contributions paid into the State unemployment fund with respect to such taxable year.

(5) **Benefit cost ratio.**- For purposes of this subsection-

(A) **In general.**- The benefit cost ratio for any calendar year is the percentage determined by dividing-

(i) the sum of the total of the compensation paid under

the State unemployment compensation law during such calendar year and any interest paid during such calendar year on advances made to the State under title XII of the Social Security Act, by

(ii) the total amount of the remuneration subject to contributions under the State unemployment compensation law with respect to such calendar year (determined without regard to any limitation on the amount of remuneration subject to contribution under the State law).

(B) **Reimbursable benefits not taken into account.**- For purposes of subparagraph (A), compensation

shall not be taken into account to the extent-

(i) the State is entitled to reimbursement for such compensation under the provisions of any Federal law, or

(ii) such compensation is attributable to services performed for a reimbursing employer.

(C) **Reimbursing employer.** The term "reimbursing employer" means any governmental entity or other organization (or group of governmental entitles or any other organizations) which makes reimbursements in lieu of contributions to the State unemployment fund.

(D) **Special rules for years before 1985.-**

(i) **Taxable year 1983.-** For purposes of determining whether a State meets the requirements of paragraph (2)(C) for taxable year 1984, only regular compensation (as so defined) shall be taken into account for purposes of determining the benefit ratio for any preceding calendar year before 1981.

(E) **Rounding.-** If any percentage determined under subparagraph (A) is not a multiple of .1 percent, such percentage shall be reduced to the nearest multiple of .1 percent.

(6) **Reports.-** The Secretary of Labor may, by regulations, require a State to furnish such information at such time

and in such manner as may be necessary for purposes of this subsection.

(7) **Definitions and special rules.-** The definitions and special rules set forth in subsection (d) shall apply to this subsection in the same manner as they apply to subsection (c).

(8) **Partial limitation.-**

(A) In the case of a State which would meet the requirements of this subsection for a taxable year prior to 1986 but for its failure to meet one of the requirements contained in subparagraph (C) or (D) of paragraph (2), the reduction under subsection (c)(2) in credits otherwise applicable to taxpayers in such State for such taxable year and each subsequent year (in a period of consecutive years for each of which a credit reduction

is in effect for taxpayers in such State) shall be reduced by 0.1 percentage point.

(B) In the case of a State which does not meet the requirements of paragraph (2) but meets the requirements of subparagraphs (A) and (B) of paragraph (2) and which also meets the requirements of section 1202(b)(8)(B) of the Social Security Act with respect to such taxable year, the reduction under subsection (c)(2) in credits otherwise applicable to taxpayers in such State for such taxable year and each subsequent year (in a period of consecutive years for each of which a credit reduction is in effect for taxpayers in such State) shall be further reduced by an additional 0.1 percentage point.

(C) In no case shall the application of subparagraphs (A) and (B) reduce the credit reduction otherwise applicable under subsection (c)(2) below the limitation under paragraph (1).

(g) **Credit reduction not to apply when state makes certain repayments.-**

(1) **In general.-** In the case of any State which meets requirements of paragraph (2) with respect to any taxable year, subsection (c)(2) shall not apply to such taxable year; except that such taxable year (and January 1 of such taxable year) shall (except as provided in subsection (f)(3)) be taken into account for purposes of applying subsection (c)(2) to succeeding taxable years.

(2) **Requirements.-** The requirements of this paragraph are met by any State

with respect to any taxable year if the Secretary of Labor determines that-

(A) the repayments during the 1-year period ending on November 9 of such taxable year made by such State of advances under title XII of the Social Security Act are not less than the sum of-

(i) the potential additional taxes for such taxable year, and

(ii) any advances made to such State during such 1-year period under such title XII,

(B) there will be sufficient amounts in the State unemployment fund to pay all compensation during the 3-month period beginning on November 1 of such taxable year without receiving any advance under

title XII of the Social Security Act, and

(C) there is a net increase in the solvency of the State unemployment compensation system for the taxable year attributable to changes made in the State law after the date on which the first advance taken into account in determining the amount of the potential additional taxes was made (or, if later, after the date of the enactment of this subsection) and such net increase equals or exceeds the potential additional taxes for such taxable year.

(3) **Definitions.-** For purposes of paragraph (2)-

(A) **Potential additional taxes.-** The term "potential additional taxes" means, with respect to any

State for any taxable year, the aggregate amount of the additional tax which would be payable under this chapter for such taxable year by all taxpayers subject to the unemployment compensation law of such State for such taxable year if paragraph (2) of subsection (c) had applied to such taxable year and any preceding taxable year without regard to this subsection but with regard to subsection (f).

(B) **Treatment of certain reductions.-** Any reduction in the State's balance under section 901(d)(1) of the Social Security Act shall not be treated as a repayment made by such state.

(4) **Reports.-** The Secretary of Labor may require a State to furnish such information at such time and in such

manner as may be necessary for purposes of paragraph (2).

§ 3303. Conditions of additional credit allowance

(a) **State standards.-** A taxpayer shall be allowed an additional credit under section 3302(b) with respect to any reduced rate of contributions permitted by a State law, only if the Secretary of Labor finds that under such law-

(1) no reduced rate of contributions to a pooled fund or to a partially pooled account is permitted to a person (or group of persons) having individuals in his (or their) employ except on the basis of his (or their) experience with respect to unemployment or other factors bearing a direct relation to unemployment risk during not less than the 3 consecutive years immediately preceding the computation date;

(2) no reduced rate of contributions to a guaranteed employment account is permitted to a person (or a group of persons) having individuals in his (or their) employ unless-

(A) the guaranty of remuneration was fulfilled in the year preceding the computation date; and

(B) the balance of such account amounts to not less than 2-1/2 percent of that part of the payroll or payrolls for the 3 years preceding the computation date by which contributions to such account were measured; and

(C) such contributions were payable to such account with respect to 3 years preceding the computation date;

(3) no reduced rate of contributions to a reserve account is permitted to a

person (or group of persons) having individuals in his (or their) employ unless-

(A) compensation has been payable from such account throughout the year preceding the computation date, and

(B) the balance of such account amounts to not less than five times the largest amount of compensation paid from such account within any 1 of the 3 years preceding such date, and

(C) the balance of such account amounts to not less than 2-1/2 percent of that part of the payroll or payrolls for the 3 years preceding such date by which contributions to such account were measured, and

(D) such contributions were payable to such account with respect to the 3 years preceding the computation date.

For any person (or group of persons) who has (or have) not been subject to the State law for a period of time sufficient to compute the reduced rates permitted by paragraphs (1), (2), and (3) of this subsection on a 3-year basis (i) the period of time required may be reduced to the amount of time the person (or group of persons) has (or have) had experience under or has (or have) been subject to the State law, whichever is appropriate, but in no case less than 1 year immediately preceding the computation date, or (ii) a reduced rate (not less than 1 percent) may be permitted by the State law on a reasonable basis

other than as permitted by paragraph (1), (2) or (3).

(b) **Certification by the Secretary of Labor with respect to additional credit allowance.-**

(1) On October 31 of each calendar year, the Secretary of Labor shall certify to the Secretary of the Treasury the law of each State (certified by the Secretary of Labor as provided in section 3304 for the 12-month period ending on such October 31), with respect to which he finds that reduced rates of contributions were allowable with respect to such 12-month period only in accordance with the provisions of subsection (a).

(2) If the Secretary of Labor finds that under the law of a single State (certified by the Secretary of Labor as provided in section 3304) more than one type of fund or account is maintained, and reduced rates of contributions to

more than one type of fund or account were allowable with respect to any 12-month period ending on October 31, and one or more of such reduced rates were allowable under conditions not fulfilling the requirements of subsection (a), the Secretary of Labor shall, on such October 31, certify to the Secretary of the Treasury only those provisions of the State law pursuant to which reduced rates of contributions were allowable with respect to such 12-month period under conditions fulfilling the requirements of subsection (a), and shall, in connection therewith, designate the kind of fund or account, as defined in subsection (c), established by the provisions so certified. If the Secretary of Labor finds that a part of any reduced rate of contributions payable under such law or under such provisions is required to

be paid into one fund or account and a part into another fund or account, the Secretary of Labor shall make such certification pursuant to this paragraph as he finds will assure the allowance of additional credits only with respect to that part of the reduced rate of contributions which is allowable under provisions which do fulfill the requirements of subsection (a).

(3) The Secretary of Labor shall, within 30 days after any State law is submitted to him for such purpose, certify to the State agency his findings with respect to reduced rates of contributions to a type of fund or account, as defined in subsection (c), which are allowable under such State law only in accordance with the provisions of subsection (a). After making such findings, the Secretary of Labor shall

not withhold his certification to the Secretary of the Treasury of such State law, or of the provisions thereof with respect to which such findings were made, for any 12-month period ending on October 31 pursuant to paragraph (1) or (2) unless, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds the State law no longer contains the provisions specified in subsection (a) or the State has, with respect to such 12-month period, failed to comply substantially with any such provision.

(c) **Definitions.-** As used in this section-

(1) **Reserve account.-** The term "reserve account" means a separate account in an unemployment fund, maintained with respect to a person (or group of persons) having individuals in his (or their) employ, from which account,

unless such account is exhausted, is paid all and only compensation payable on the basis of services performed for such person (or for one or more of the persons comprising the group).

(2) **Pooled fund.-** The term "pooled fund" means an unemployment fund or any part thereof (other than a reserve account or a guaranteed employment account) into which the total contributions of persons contributing thereto are payable, in which all contributions are mingled and undivided, and from which compensation is payable to all individuals eligible for compensation from such fund.

(3) **Partially pooled account.-** The term "partially pooled account" means a part of an unemployment fund in which part of the fund all contributions thereto are mingled and undivided, and from which

part of the fund compensation is payable only to individuals to whom compensation would be payable from a reserve account or from a guaranteed employment account but for the exhaustion or termination of such reserve account or of such guaranteed employment account. Payments from a reserve account or guaranteed employment account into a partially pooled account shall not be construed to be inconsistent with the provisions of paragraph (1) or (4).

(4) **Guaranteed employment account.-** The term "guaranteed employment account" means a separate account, in an unemployment fund, maintained with respect to a person (or group of persons) having individuals in his (or their) employ who, in accordance with the provisions of the State law or of a plan thereunder approved by the State agency.

(A) guarantees in advance at least 30 hours of work, for which remuneration will be paid at not less than stated rates, for each of 40 weeks (or if more, 1 weekly hour may be deducted for each added week guaranteed) in a year, to all the individuals who are in his (or their) employ in, and who continue to be available for suitable work in, one or more distinct establishments, except that any such individual's guaranty may commence after a probationary period (included within the 11 or less consecutive weeks immediately following the first week in which the individual renders services), and

(B) gives security or assurance, satisfactory to the State agency, for the fulfillment of such guaran-

ties, from which account, unless such account is exhausted or terminated, is paid all and only compensation, payable on the basis of services performed for such person (or for one or more of the persons comprising the group), to any such individual whose guaranteed remuneration has not been paid (either pursuant to the guaranty or from the security or assurance provided for the fulfillment of the guaranty), or whose guaranty is not renewed and who is otherwise eligible for compensaticn under the State law.

(5) **Year.-** The term "year" means only 12 consecutive calendar months.

(6) **Balance.-** The term "balance", with respect to a reserve account or a guaranteed employment account, means the

amount standing to the credit of the account as of the computation date; except that, if subsequent to January 1, 1940, any moneys have been paid into or credited to such account other than payments thereto by persons having individuals in their employ, such term shall mean the amount in such account as of the computation date less the total of such other moneys paid into or credited to such account subsequent to January 1, 1940.

(7) **Computation date.-** The term "computation date" means the date, occurring at least once in each calendar year and within 27 weeks prior to the effective date of new rates of contributions, as of which such rates are computed.

(8) **Reduced rate.-** The term "reduced rate" means a rate of contributions lower

than the standard rate applicable under the State law, and the term "standard rate" means the rate on the basis of which variations therefrom are computed.

(d) **Voluntary contributions.-** A State law may, without being deemed to violate the standards set forth in subsection (a), permit voluntary contributions to be used in the computation of reduced rates if such contributions are paid prior to the expiration of 120 days after the beginning of the year for which such rates are effective.

(e) **Payments by certain nonprofit organizations.-** A State may, without being deemed to violate the standards set forth in subsection (a), permit an organization (or a group of organizations) described in section 501(c)(3) which is exempt from income tax under section 501(a) to elect (in lieu of paying contributions) to pay into the State unemployment fund amounts equal to the amounts of compensation

attributable under the State law to service performed in the employ of such organization (or group).

(f) **Transition.-** To facilitate the orderly transition to coverage of service to which section 3309(a)(1)(A) applies, a State law may provide that an organization (or group of organizations) which elects before April 1, 1972, to make payments (in lieu of contributions) into the State unemployment fund as provided in section 3309(a)(2), and which had paid contributions into such fund under the State law with respect to such service performed in its employ before January 1, 1969, is not required to make any such payment (in lieu of contributions) on account of compensation paid after its election as heretofore described which is attributable under the State law to service performed in its employ, until the total of such compensation equals the amount-

(1) by which the contributions paid by such organization (or group) with respect to a period before the election provided by section 3309(a)(2), exceed

(2) the unemployment compensation for the same period which was charged to the experience-rating account of such organization (or group) or paid under the State law on the basis of wages by it or service performed in its employ, whichever is appropriate.

(g) **Transitional rule for Unemployment Compensation Amendments 1976.-** To facilitate the orderly transition to coverage of service to which section 3309(a)(1)(A) applies by reason of the enactment of the Unemployment Compensation Amendments of 1976, a State law may provide that an organization (or group of organizations) which elects, when such election first becomes available under the State law with respect to such service, to

make payments (in lieu of contributions) into the State unemployment fund as provided in section 3309(a)(2), and which had paid contributions into such fund under the State law with respect to such service performed in its employ before the date of the enactment of this subsection, is not required to make any such payment (in lieu of contributions) on account of compensation paid after its election as heretofore described which is attributable under the State law to such service performed in its employ, until the total of such compensation equals the amount-

(1) by which the contributions paid by such organization (or group) on the basis of wages for such service with respect to a period before the election provided by section 3309(a)(2), exceed

(2) the unemployment compensation for the same period which was charged to the experience-rating account of such

organization (or group) or paid under the State law on the basis of such service performed in its employ or wages paid for such service, whichever is appropriate.

§ 3304. Approval of State laws

(a) **Requirements.-** The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that-

(1) all compensation is to be paid through public employment offices or such other agencies as the Secretary of Labor may approve;

(2) no compensation shall be payable with respect to any day of unemployment occurring within 2 years after the first day of the first period with respect to which contributions are required;

(3) all money received in the unemployment fund shall (except for refunds of

sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 3305(b)) immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904 of the Social Security Act (42 U.S.C. 1104);

(4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that-

(A) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash

benefits to individuals with respect to their disability, exclusive of expenses of administration;

(B) the amounts specified by section 903(c)(2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices;

(C) nothing in this paragraph shall be construed to prohibit deducting an amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance if the individual elected to have such deduction made and such deduction was made under

a program approved by the Secretary of Labor; and

(D) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act;

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions;

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that

(i) with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period be-

tween two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms,

(ii) with respect to services in any other capacity for an educational institutional to which section 3309(a)(1) applies-

(I) compensation payable on the basis of such services

shall be denied to any individual for any week which commences during a period between 2 successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms, except that

(II) if compensation is denied to any individual for any week under subclause (I) and such individual was not offered an opportunity to perform such services for that educational institution for the second of such academic

years or terms, such individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of subclause (I),

(ii) with respect to any services described in clause (i) or (ii), compensation payable on the basis of such services shall be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable

assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess,

(iv) with respect to any services described in clause (i) or (ii), compensation payable on the basis of services in any such capacity shall be denied as specified in clauses (i), (ii), and (iii) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions, and

(v) with respect to services to which section 3309(a)(1) applies, if such services are provided to or on behalf of an educational institution, compensation may be denied under the same circumstances as described in clauses (i) through (iv), and

(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in section 3309(a)(2);

(7) an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year;

(8) compensation shall not be denied to an individual for any week because

he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work);

(9)(A) compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;

(B) the State shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under the unemployment compensation law

of other States which are approved by the Secretary of Labor in consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations. Any such arrangement shall include provisions for (i) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State laws, and (ii) avoiding duplicate use of wages and employment by reason of such combining;

(10) compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with

a claim for compensation, or receipt of disqualifying income;

(11) extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970;

(12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy;

(13) compensation shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there

is a reasonable assurance that such individual will perform such services in the later of such seasons (or similar periods);

(14)(A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act),

(B) any data or information required of individuals applying for compensation

to determine whether compensation is not payable to them because of their alien status shall be uniformly required from all applicants for compensation, and

(C) in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence;

(15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero)

by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such work except that-

(A) the requirement of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if-

(i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and

(ii) in the case of such a payment not made under the Social Security Act or the

Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

(B) the State law may provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment;

(16)(A) wage information contained in the records of the agency administering the State law which is necessary (as determined by the Secretary of Health, Education, and Welfare in regulations) for purposes of determining an individual's eligibility for aid or services, or the amount of such aid or services, under a State plan for aid and services to needy families with children approved under part A of title IV of the Social Security Act, shall be made available to a State or political subdivision thereof when such information is specifically requested by such State or political subdivision for such purposes, and

(B) such safeguards are established as are necessary (as determined by the Secretary of Health, Education, and Welfare in regulations) to insure that such information is used only for the

purposes authorized under subparagraph (A);

(17) any interest required to be paid on advances under title XII of the Social Security Act shall be paid in a timely manner and shall not be paid, directly or indirectly (by an equivalent reduction in State unemployment taxes or otherwise) by such State from amounts in such State's unemployment fund; and

(18) all the rights, privileges, or immunities conferred by such law or by act done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

(b) **Notification.-** The Secretary of Labor shall, upon approving such law, notify the governor of the State of his approval.

(c) **Certification.-** On October 31 of each taxable year the Secretary of Labor shall certify to the Secretary of the Treasury each

State whose law he has previously approved, except that he shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has amended its law so that it no longer contains the provisions specified in subsection (a) or has with respect to the 12-month period ending on such October 31 failed to comply substantially with any such provision in such subsection. No finding of a failure to comply substantially with any provision in paragraph (5) of subsection (a) shall be based on an application or interpretation of State law (1) until all administrative review provided for under the laws of the State has been exhausted, or (2) with respect to which the time for judicial review provided by the laws of the State has not expired, or (3) with respect to which any judicial review is pending. On October 31 of any taxable year, the Secretary of Labor

shall not certify any State which, after reasonably notice and opportunity for hearing to the State agency, the Secretary of Labor finds has failed to amend its law so that it contains each of the provisions required by law to be included therein (including provisions relating to the Federal-State Extended Unemployment Compensation Act of 1970 (or any amendments thereto) as required under subsection(a)(11)), or has, with respect to the twelve-month period ending on such October 31, failed to comply substantially with any such provision.

(d) **Notice of noncertification.-** If at any time the Secretary of Labor has reason to believe that a State whose law he has previously approved may not be certified under subsection (c), he shall promptly so notify the governor of such State.

(e) **Change of law during 12-month period.-** Whenever-

(1) any provision of this section, section 3302, or section 3303 refers to a 12-month period ending on October 31 of a year, and

(2) the law applicable to one portion of such period differs from the law applicable to another portion of such period,

then such provision shall be applied by taking into account for each such portion the law applicable to such portion.

(f) **Definition of institution of higher education.-** For purposes of subsection (a)(6), the term "institution of higher education" means an educational institution in any State which-

(1) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) is legally authorized within such State to provide a program of education beyond high school;

(3) provides an educational program for it which awards bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, or offers a program of training to prepare students for gainful employment in a recognized occupation; and

(4) is a public or other nonprofit institution.

Federal-State Extended Unemployment Compensation Act of 1970

Sec. 201 [Short title]. This title may be cited as the "Federal-State Extended Unemployment Compensation Act of 1970".

Sec. 202 [Payment of extended compensation]. (a) **[State law requirements]** (1) For purposes of section 3304(a)(11) of the Internal Revenue Code of 1986 [(formerly I.R.C. 1954) subsec. (a)(11) of this section] a State law shall provide that payment of extended compensation shall be made, for any week of unemployment which begins in the individual's eligibility period, to individuals who have exhausted all rights to regular compensation under the State law and who have no rights to regular compensation with respect to such week under such law or any other State unemployment compensation law or to compensation under any other Federal law and are not receiving compensation

with respect to such week under the unemployment compensation law of Canada. For purposes of the preceding sentence, an individual shall have exhausted his rights to regular compensation under a State law (A) when no payments of regular compensation can be made under such law because such individual ha received all regular compensation available to him based on employment or wages during his base period, or (B) when his rights to such compensation having terminated by reason of the expiration of the benefit year with respect to which such rights existed.

(2) Except where inconsistent with the provisions of this title [Title II of Pub.L. 91-373], the terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof shall apply to claims for extended compensation and to the payment thereof.

(3)(A) Notwithstanding the provisions of paragraph (2), payment of extended compensation under this Act [Title II of Pub.L. 91-373] shall not be made to any individual for any week of unemployment in his eligibility period-

(i) during which he fails to accept any offer of suitable work (as defined in subparagraph (c) [probably means subpar. (C)] or fails to apply for any suitable work to which he was referred by the State agency; or

(ii) during which he fails to actively engage in seeking work, unless such individual is not actively engaged in seeking work because such individual is, as determined in accordance with State law-

(I) before any court of the United States or any State pursuant

to a lawfully issued summons to appear for jury duty (as such term amy be defined by the Secretary of Labor), or

(II) hospitalized for treatment of an emergency or a life-threatening condition (as such term amy be defined by such Secretary),

if such exemption in clauses (i) and (ii) apply for recipients of regular benefits, and the State chooses to apply such exemptions for recipients of extended benefits.

(B) If any individual is ineligible for extended compensation for any week by reason of a failure described in clause (i) or (ii) of subparagraph (A), the individual shall be ineligible to receive extended compensation for any week which begins during a period which-

(i) begins with the week following the week in which such failure occurs, and

(ii) does not end until such individual has been employed during at least 4 weeks which begin after such failure and the total of the remuneration earned by the individual for being so employed is not less than the product of 4 multiplied by the individual's average weekly benefit amount (as determined for purposes of subsection (b)(1)(c) [subsec. (b)(1)(C)]) for his benefit year.

(C) For purposes of this paragraph, the term "suitable work" means, with respect to any individual, any work which is within such individual's capabilities except that, if the individual furnishes evidence satisfactory to the State agency that such individual's prospects for obtaining work in his customary occupation within a reasonable short period

are good, the determination of whether any work is suitable work with respect to such individual shall be made in accordance with the applicable State law.

(D) Extended compensation shall not be denied under clause (i) of subparagraph (A) to any individual for any week by reason of a failure to accept an offer of, or apply for, suitable work-

(i) if the gross average weekly remuneration payable to such individual for the position does not exceed the sum of-

(I) the individual's average weekly benefit amount (as determined for purposes of subsection (b)(1)(C)) for his benefit year, plus

(II) the amount (if any) of supplemental unemployment compensa-

tion benefits (as defined in section 501(c)(17)(D) of the Internal Revenue Code of 1986 [section 501(c)(17)(D) of this title]) payable to such individual for such week;

(ii) if the position was not offered to such individual in writing and was not listed with the State employment service;

(iii) if such failure would not result in a denial of compensation under the provisions of the applicable State law to the extent that such provisions of subparagraphs (C) and (E); or

(iv) if the position pays wages less than the higher of-

(I) the minimum wage provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 [section

206(a)(1) of Title 29, Labor], without regard to any exemption; or

(II) any applicable State or local minimum wage.

(E) For purposes of this paragraph, an individual shall be treated as actively engaged in seeking working during any week if-

(i) the individual has engaged in a systematic and sustained effort to obtain work during such week, and

(ii) the individual provides tangible evidence to the State agency that he has engaged in such an effort during such week.

(F) For purposes of section 3304(a)(11) of the Internal Revenue Code of 1986 [subsec. (a)(11) of this section], a State law shall provide for referring applicants for benefits

under this Act [Title II of Pub.L. 91-373] to any suitable work in which clauses (i), (ii), (iii), and (iv) of subparagraph (D) would not apply.

(4) No provision of State law which terminates a disqualification for voluntarily leaving employment, being discharged for misconduct, or refusing suitable employment shall apply for purposes of determining eligibility for extended compensation unless such termination is based upon employment subsequent to the date of such disqualification.

(5) Notwithstanding the provisions of paragraph (2), an individual shall not be eligible for extended compensation unless, in the base period with respect to which the individual exhausted all rights to regular compensation under the State law, the individual had 20 weeks of full-time insured employ-

ment, or the equivalent in insured wages. For purposes of this paragraph, the equivalent in insured wages shall be earnings covered by the State law for compensation purposes which exceed 40 times the individual's most recent weekly benefit amount or 1-1/2 times the individual's insured wages in that calendar quarter of the base period in which the individual's insured wages were the highest (or one such quarter if his wages were the same for more than one such quarter). The State shall by law provide which one of the foregoing methods of measuring employment and earnings shall be used in that State.

(6) No payment shall be made under this Act [Title II of Pub.L. 91-373] to any State in respect of any extended compensation or shareable regular compensation paid to any individual for any week if, under the rules of paragraphs (3), (4) and (5) extended

compensation would not have been payable to such individual for such week.

(b) [**Individuals' compensation accounts**] (1) The State law shall provide that the State will establish, for each eligible individual who files an application therefor, an extended compensation account with respect to such individual's benefit year. The amount established in such account shall not be less than whichever of the following is the least:

(A) 50 per centum of the total amount of regular compensation (including dependents' allowances) payable to him during such benefit year under such law,

(B) thirteen times his average weekly benefit amount, or

(C) thirty-nine times his average weekly benefit amount, reduced by the regular compensation paid (or deemed

paid) to him during such benefit year under such law;

except that the amount so determined shall (if the State law so provided) be reduced by the aggregate amount of additional compensation paid (or deemed paid) to him under such law for prior weeks of unemployment in such benefit year which did not begin in an extended benefit period.

(2) For purposes of paragraph (1), an individual's weekly benefit amount for a week is the amount of regular compensation (including dependents' allowances) under the State law payable to such individual for such week for total unemployment.

(c) [**Cessation of extended benefits when paid under an interstate claim in a state where extended benefit period is not in effect**]. (1) Except as provided in paragraph (2), payment of extended compensation shall

not be made to any individual for any week if-

(A) extended compensation would (but for this subsection) have been payable for such week pursuant to an interstate claim filed in any State under the interstate benefit payment plan, and

(B) an extended benefit period is not in effect for such week in such State.

(2) Paragraph (1) shall not apply with respect to the first 2 weeks for which extended compensation is payable (determined without regard to this subsection) pursuant to an interstate claim filed under the interstate benefit payment plan to the individual from the extended compensation account established for the benefit year.

(3) Section 3304(a)(9)(A) of the Internal Revenue Code of 1986 [subsec. (a)(9)(A) of this section] shall not apply to any denial

of compensation required under this subsection.

Sec. 203 [Extended benefit period]. (a) **[Beginning and ending]** For purposes of this title [Title II of Pub. L. 91-373], in the case of any State, an extended benefit period-

(1) shall begin with the third week after the first week for which there is a State "on" indicator; and

(2) shall end with the third week after the first week for which there is a State "off" indicator.

(b) **[Special rules]** (1) In the case of any State-

(A) no extended benefit period shall last for a period of less than thirteen consecutive weeks, and

(B) no extended benefit period may begin before the fourteenth week after

the close of a prior extended benefit period with respect to such State.

(2) When a determination has been made that an extended benefit period is beginning or ending with respect to a State, the Secretary shall cause notice of such determination to be published in the Federal Register.

(c) **[[Eligibility period]** For purposes of this title [Title II of Pub.L. 91-373], an individual's eligibility period under the State law shall consist of the weeks in his benefit year which begin in an extended benefit period and, if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such extended benefit period.

(d) **[State "on" and "off" indicators]** For purposes of this section-

(1) There is a State "on" indicator for a week if the rate of insured

unemployment under the State law for the period consisting of such week and the immediately preceding twelve weeks-

(A) equaled or exceeded 120 per centum of the average of such rates for the corresponding thirteen-week period ending in each of the preceding two calendar years, and

(B) equaled or exceeded 5 per centum.

(2) There is a State "off" indicator for a week if, for the period consisting of such week and the immediately preceding twelve weeks, either subparagraph (A) or subparagraph (B) of paragraph (1) is not satisfied.

Effective with respect to compensation for weeks of unemployment beginning after March 30, 1977 (or, if later, the date established pursuant to State law), the State may by law

provide that the determination of whether there has been a State "on" or "off" indicator beginning or ending any extended benefit period shall be made under this subsection as if (i) paragraph (1) did not contain subparagraph (A) thereof, and (ii) the figure "3" contained in subparagraph (B) thereof were "6"; except that, notwithstanding any such provision of State law, any week for which there would otherwise be a State "on" indicator shall continue to be such a week and shall not be determined to be a week for which there is a State "off" indicator. For purposes of this subsection, the rate of insured unemployment for any thirteen-week period shall be determined by reference to the average monthly covered employment under the State law for the first four of the most recent six calendar quarters ending before the close of such period.

(e) **[Rate of insured unemployment; covered employment]** (1) For purposes of subsections (d) the term "rate of insured unemployment" means the percentage arrived at by dividing-

(A) the average weekly number of individuals filing claims for regular compensation for weeks of unemployment with respect to the specified period as determined on the basis of the reports made by the State agency to the Secretary, by

(B) the average monthly covered employment for the specified period.

(2) Determinations under subsection (d) shall be made by the State agency in accordance with regulations prescribed by the Secretary.

Sec. 204 [Payments to States]. (a) **[Amount payable]** (1) There shall be paid to each

State an amount equal to one-half of the sum of-

(A) the sharable extended compensation, and

(B) the sharable regular compensation paid to individuals under the State law.

(2) No payment shall be made to any State under this subsection in respect of compensation (A) for which the State is entitled to reimbursement under the provisions of any Federal law other than this Act, (B) paid for the first week in an individual's eligibility period for which extended compensation or shareable regular compensation is paid, if the State law of such State provides for payment at any time or under any circumstance of regular compensation to an individual for his first week of otherwise compensable unemployment, (C) paid for any week with respect to which such benefits are not payable

by reason of section 233(d) of the Trade Act of 1974 [section 2293(d) of Title 19, Custom Duties], or (D) paid to an individual with respect to a week of unemployment to the extent that such amount exceeds the amount of such compensation which would be paid to such individual if such State had a benefit structure which provided that the amount of compensation otherwise payable to any individual for any week shall be rounded (if not a full dollar amount) to the nearest lower full dollar amount.

(3) The amount which, but for this paragraph, would be payable under this subsection to any State in respect of any compensation paid to an individual whose base period wages include wages for services to which section 3306(c)(7) of the Internal Revenue Code of 1986 [section 3306(c)(7) of this title] applies shall be reduced by an amount which

bears the same ratio to the amount which, but for this paragraph, would be payable under this subsection to such State in respect of such compensation as the amount of the base period wages attributable to such services bears to the total amount of the base period wages.

(b) **[Sharable extended compensation]** For purposes of subsection (a)(1)(A), extended compensation paid to an individual for weeks of unemployment in such individual's eligibility period is sharable extended compensation to the extent that the aggregate extended compensation paid to such individual with respect to any benefit year does not exceed the smallest of the amounts referred to in subparagraphs (A), (B), and (C) of section 202(b)(1).

(c) **[Sharable regular compensation]** For purposes of subsection (a)(1)(B), regular

compensation paid to an individual for a week of unemployment is sharable regular compensation-

(1) if such week is in such individual's eligibility period (determined under section 203(c)), and

(2) to the extent that the sum of such compensation, plus the regular compensation paid (or deemed paid) to him with respect to prior weeks of unemployment in the benefit year, exceeds twenty-six times (and does not exceed thirty-nine times) the average weekly benefit amount (including allowances for dependents) for weeks of total unemployment payable to such individual under the State law in such benefit year.

(d) **[Payment on calendar month basis]** There shall be paid to each State either in advance or by way of reimbursement, as may be deter-

mined by the Secretary, such sum as the Secretary estimates the State will be entitled to receive under this title [Title II of Pub.L. 91-373] for each calendar month, reduced or increased, as the case may be, by any sum by which the Secretary finds that his estimates for any prior calendar month were greater or less than the amounts which should have been paid to the State. Such estimates may be made upon the basis of such statistical, sampling, or other method as may be agreed upon by the Secretary and the State agency.

(e) **[Certification]** The Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under this section. The Secretary of the Treasury, prior to audit or settlement by the General Accounting Office, shall make payment to the State in

accordance with such certification, by transfers from the extended unemployment compensation account to the account of such State in the Unemployment Trust Fund.

Sec. 205 [Definitions]. For purposes of this title [Title II of Pub.L. 91-373]-

(1) The term "compensation" means cash benefits payable to individuals with respect to their unemployment.

(2) The term "regular compensation" means compensation payable to an individual under any State unemployment compensation law (including compensation payable pursuant to 5 U.S.C. Chapter 85) [section 8501 et seq. of Title 5, Government Organization and Employees], other than extended compensation and additional compensation.

(3) The term "extended compensation" means compensation (including additional

compensation and compensation payable pursuant to 5 U.S.C. chapter 8501 [section et seq. of Title 5, Government Organization and Employees]) payable for weeks of unemployment beginning in an extended benefit period to an individual under those provisions of the State law which satisfy the requirements of this title [Title II of Pub.L. 91-373] with respect to the payment of extended compensation.

(4) The term "additional compensation" means compensation payable to exhaustees by reason of conditions of high unemployment or by reason of other special factors.

(5) The term "benefit year" means the benefit year as defined in the applicable State law.

(6) The term "base period" means the base period as determined under applicable State law for the benefit year.

(7) The term "Secretary" means the Secretary of Labor of the United States.

(8) The term "State" includes the District of Columbia and the Commonwealth of Puerto Rico, and the Virgin Islands.

(9) The term "State agency" means the agency of the State which administers its State law.

(10) The term "State law" means the unemployment compensation law of the State, approved by the Secretary under section 3304 of the Internal Revenue Code of 1986 [this section].

(11) The term "week" means a week as defined in the applicable State law.

Sec. 206 [Approval of State laws]. [Section 206 amended subsec. (a) of this section by

adding par. (11) thereof. Such amendment has been executed to the text of subsec. (a) and is therefore not set out here.]

Sec. 207 [Effective dates]. (a) Except as provided in subsection (b)-

(1) in applying section 203, no extended benefit period may begin with a week beginning before January 1, 1972; and

(2) section 204 shall apply only with respect to weeks of unemployment beginning after December 31, 1971.

(b)(1) In the case of a State law approve[d] under section 3304(a)(11) of the Internal Revenue Code of 1986 [subsec. (a)(11) of this section] such State law may also provide that an extended benefit period may begin with a week established pursuant to such law which begins earlier than January 1, 1972,

but not earlier than 60 days after the date of the enactment of this Act [Aug. 10, 1970].

(2) For purposes of paragraph (1), with respect to weeks beginning before January 1, 1972, the extended benefit period for the State shall be determined under section 203(a) solely by reference to the State "on" indicator and the State "off" indicator.

(3) In the case of a State law containing a provision described in paragraph (1), section 204 shall also apply with respect to weeks of unemployment in extended benefit periods determined pursuant to paragraph (1).

(c) Section 3304(a)(11) of the Internal Revenue Code of 1954 [subsec. (a)(11) of this section] (as added by section 206) shall not be a requirement for the State law of any State-

(1) in the case of any State the legislature of which does not meet in

a regular session which closes during the calendar year 1971, with respect to any week of unemployment which begins prior to July 1, 1972; or

(2) in the case of any other State, with respect to any week of unemployment which begins prior to January 1, 1972.

Federal Supplemental Compensation Act of 1982

SHORT TITLE

Sec. 601. This subtitle may be cited as the "Federal Supplemental Compensation Act of 1982".

FEDERAL-STATE AGREEMENTS

Sec. 602. (a) Any State which desires to do so may enter into and participate in an agreement with the Secretary of Labor (hereinafter in this title referred to as the "Secretary") under this subtitle. Any State which is a party to an agreement under this subtitle may upon providing thirty days' written notice to the Secretary, terminate such agreement.

(b) Any such agreement shall provide that the State agency of the State will make payments of Federal supplemental compensation-

(1) to individuals who-

(A) have exhausted all rights to regular compensation under the State law;

(B) have no rights to compensation (including both regular compensation and extended compensation) with respect to a week under such law or any other State unemployment compensation law or to compensation under any other Federal law (and is not paid or entitled to be paid any additional compensation under any such State or Federal law); and

(C) are not receiving compensation with respect to such week under the unemployment compensation law of Canada;

(2) for any week of unemployment which begins in the individual's period of eligibility.

except that no payment of Federal supplemental compensation shall be made to any individual for any week of unemployment which begins more

than two years after the end of the benefit year for which he exhausted his rights to regular compensation.

(c) For purposes of subsection (b)(1) an individual shall be deemed to have exhausted his rights to regular compensation under a State law when-

(A) no payments of regular compensation can be made under such law because such individual has received all regular compensation available to him based on employment or wages during his base period; or

(B) his rights to such compensation have been terminated by reason of the expiration of the benefit year with respect to which such rights existed.

(d) For purposes of any agreement under this subtitle-

(1) the amount of the Federal supplemental compensation which shall be payable to any individual for any week of total unemployment shall be equal to the amount of the regular compensation (including dependents' allowances) payable to him during his benefit year under the State law for a week of total unemployment.

(2) the terms and conditions of the State law which apply to claims for extended compensation and to the payment thereof shall apply to claims for Federal supplemental compensation and the payment thereof; except where inconsistent with the provisions of this subtitle or with the regulations of the Secretary promulgated to carry out this subtitle;

(3) the maximum amount of Federal supplemental compensation payable to any

individual for whom an account is established under subsection (e) shall not exceed the lesser of (A) the amount established in such account for such individual, or (B) in the case of an individual filing a claim under the interstate benefit payment plan for Federal supplemental compensation, the amount which would have been established in such account if the amount established in such account were determined by reference to the applicable limit under subparagraph (A)(ii) of subsection (e)(2) applicable in the State in which the individual is filing such interstate claim under the interstate benefit payment plan for the week in which he is filing such claim.

(e)(1) Any agreement under this subtitle with a State shall provide that the State will

establish, for each eligible individual who files an application for Federal supplemental compensation, a Federal supplemental compensation account with respect to such individual's benefit year.

(2)(A)(i) Except as provided in subparagraph (B), the amount established in such account shall be equal to the lesser of-

(I) 55 per centum of the total amount of regular compensation (including dependents' allowances) payable to the individual with respect to the benefit year (as determined under the State law) on the basis of which he most recently received regular compensation, or

(II) the applicable limit times his average weekly benefit amount for his benefit year.

(ii) For purposes of clause (i)-

(I) in the case of an account from which Federal supplemental compensation was payable to an individual for a week beginning before October 19, 1983, the applicable limit shall be the applicable limit in effect in the State under this paragraph (as in effect on the day before the date of the enactment of the Federal Supplemental Compensation Amendments of 1983 [Pub.L. 98-135, Oct. 24, 1983, 97 Stat. 857], for the last week beginning before October 19, 1983, or

(II) in the case of an account from which Federal supplemental compensation is first payable for a week beginning after October 18, 1983, the applicable limit shall be the applicable limit determined under the following table with respect to the first week for which

Federal supplemental compensation is payable from such account:

In the case of weeks during a:	The applicable limit is:
6-percent period	14
5-percent period	12
4-percent period	10
Low-unemployment period	8.

(B) In the case of any account from which Federal supplemental compensation was first payable for a week which begins after March 31, 1983, and before October 19, 1983, the amount established in such account under subparagraph (A) shall be increased by the individual's additional entitlement. In no event shall such increase result in the individual's receiving more Federal supplemental compensation for weeks beginning after October 18, 1983, than the subparagraph (A) entitlement.

(C) For purposes of subparagraph (B) and this subparagraph-

(i) The term "additional entitlement" means the lesser of-

(I) 3/4 of the subparagraph (A) entitlement, or

(II) the individual's average weekly benefit amount for the benefit year multiplied by the applicable limit determined under clause (ii).

(ii) The applicable limit determined under this clause is-

(I) 5 if all of the amount in the individual's Federal supplemental compensation account (determined without regard to subparagraph (B)) is payable to the individual for weeks beginning before October 18, 1983, and

(II) in the case of an individual not described in subclause (I), 4 (2 if the State is not a 4-percent period or a low-unemployment period for the first week beginning after October 18, 1983).

(iii) The term "subparagraph (A) entitlement" means the amount which would have been established in the account if Federal supplemental compensation were first payable from such account for the first week beginning after October 18, 1983.

(3)(A) For purposes of this subsection, the terms "6-percent period", "5-percent period", "4-percent period", and "low-unemployment period", mean, with respect to any State, the period which-

(i) begins with the third week after the first week for which the applicable trigger is on, and

(ii) ends with the second week after the first week for which the applicable trigger is off.

(B)(i) In the case of a 6-percent period, 5-percent period, 4-percent period, or low-unemployment period, as the case may be, the applicable trigger is on for any week if-

(I) the rate of insured unemployment in the State for the period consisting of such week and the immediately preceding 12 weeks falls within the applicable range, or

(II) the rate of insured unemployment in the State for the period consisting of the last week beginning in the second calendar quarter ending before the week for which the trigger determination is

being made and all weeks preceding such last week which began on or after January 1, 1982, equals or exceeds 5.5 percent in the case of a 6-percent period (or, in the case of a 5-percent period, equals for exceeds 4.5 percent but is less than 5.5 percent).

Subclause (II) shall not apply in the case of a 4-percent period or low-unemployment period.

(ii) In the case of a 6-percent period, 5-percent period, 4-percent period, or low-unemployment period, as the case may be, the applicable trigger is off for any week if subclause (I) of clause (i) is not satisfied (or in the case of a 6-percent period or a 5-percent period, both subclauses (I) and (II) of clause (i) are not satisfied).

(iii) In the case of any 5-percent period, 4-percent period, or low-unemployment period, as the case may be, notwithstanding clauses (i) and (ii) the applicable trigger shall be off for any week if the applicable trigger for a period with higher applicable limit is on for such week.

(C) For purposes of this paragraph, the applicable range is as follows:

In the case of a:	The applicable range is:
6-percent period	A rate equal to or exceeding 6 percent.
5-percent period	A rate equal to or exceeding 5 percent but less than 6 percent.
4-percent period	A rate equal to or exceeding 4 percent but less than 5 percent.
Low-unemployment period	A rate less than 4 percent.

(D)(i) No 6-percent period, 5-percent period, 4-percent period, or low-unemployment period,as the case may be, which is in effect

for the first week beginning after October 18, 1983, or any week thereafter, shall last for a period of less than 13 weeks beginning after October 18, 1983.

(ii) The applicable limit in any State shall not be reduced or increased by more than 2 during any 13-week period beginning with the week for which such a reduction (or increase) would otherwise take effect. The preceding sentence shall not apply to any increase (or decrease) which takes effect for the first week beginning after October 18, 1983.

(E) For purposes of this subsection-

(i) The rate of insured unemployment for any period shall be determined in the same manner as determined for purposes of section 203 of the Federal-State Extended Unemployment Compensation Act of 1970 [section 203 of Pub.L. 91-373, set out as a note under this

section]; except that, for purposes of determining the rate of insured unemployment for the period described in subparagraph (B)(i)(II), the rate of insured unemployment shall be determined by reference to the average monthly covered employment under the State law for so much of such period as does not fall in the last 6 months thereof.

(ii) The amount of an individual's average weekly benefit amount shall be determined in the same manner as determined for purposes of section 202(b)(1)-(C) of such Act [section 202(b)(1)(C) of Pub.L. 91-373, set out as a note under this section].

(4) The amount of Federal supplemental compensation payable to an eligible individual shall not exceed the amount in such individu-

al's account established under this subsection.

(5)(A) Except as provided in subparagraph (B) the maximum amount of Federal supplemental compensation payable to an individual shall not be reduced by reason of any trade readjustment allowance to which the individual was entitled under the Trade Act of 1974 [Pub.L. 93-618, Jan. 3, 1975, 88 Stat. 1978].

(B) If an individual received any trade readjustment allowance under the Trade Act of 1974 [section 2101 et seq. of Title 19, customs Duties] in respect of any benefit year, the maximum amount of Federal supplemental compensation payable under this subtitle in respect of such benefit year shall be reduced (but not below zero) so that (to the extent possible by making such a reduction) the aggregate amount of-

(i) regular compensation,

(ii) extended compensation,

(iii) trade readjustment allowances, and

(iv) Federal supplemental compensation, payable in respect of such benefit year does not exceed the aggregate amount which would have been so payable had the individual not been entitled to any trade readjustment allowance.

(f)(1) No federal supplemental compensation shall be payable to any individual under an agreement entered into under this subtitle for any week beginning before whichever of the following is the later:

(A) the week following the week in which such agreement is entered into; or

(B) September 12, 1982.

(2)(A) Except as provided in subparagraph (B), no Federal supplemental compensation

shall be payable to any individual under an agreement entered into under this subtitle for any week beginning after March 31, 1985.

(B) In the case of any individual who is receiving Federal supplemental compensation for the week which includes March 31, 1985, such compensation shall continue to be payable to such individual in accordance with subsection (e) for any week thereafter, in a period of consecutive weeks for each of which he meets the eligibility requirements of this Act.

(g) The payment of Federal supplemental compensation shall not be denied to any recipient (who submits documentation prescribed by the Secretary) for any week because the recipient is in training or attending an accredited educational institution on a substantially full-time basis, or because of the application of State law to any such

recipient relating to the availability for work, the active search for work, or the refusal to accept work on account of such training or attendance, unless the State agency determines that such training or attendance will not improve the opportunities for employment of the recipient.

PAYMENTS TO STATES HAVING AGREEMENT FOR THE PAYMENT OF FEDERAL SUPPLEMENTAL COMPENSATION

Sec. 603. (a) There shall be paid to each State which has entered into an agreement under this subtitle an amount equal to 100 per centum of the Federal supplemental compensation paid to individuals by the State pursuant to such agreement.

(b) No payment shall be made to any State under this section in respect of compensation to the extent the State is entitled to reimbursement in respect of such compensation under the provisions of any Federal law other

than this subtitle or chapter 85 of title 5 of the United States Code [section 8501 et seq. of Title 5, Government Organization and Employees]. A State shall not be entitled to any reimbursement under such chapter 85 in respect of any compensation to the extent the State is entitled to reimbursement under this subtitle in respect of such compensation.

(c) Sums payable to any State by reason of such State's having an agreement under this subtitle shall be payable, either in advance or by way of reimbursement (as may be determined by the Secretary), in such amounts as the Secretary estimates the State will be entitled to receive under this subtitle for each calendar month, reduced or increased, as the case may be, by any amount by which the Secretary finds that his estimates for any prior calendar month were greater or less than the amounts which should have been paid

to the State. Such estimates may be made on the basis of such statistical sampling, or other method as may be agreed upon by the Secretary and the State agency of the State involved.

FINANCING PROVISIONS

Sec. 604. (a)(1) Funds in the extended unemployment compensation account (as established by section 905 of the Social Security Act) [section 1105 of Title 42, the Public Health and Welfare] of the Unemployment Trust Fund shall be used for the making of payments to States having agreements entered into under this subtitle.

(2) The Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under this subtitle. The Secretary of the Treasury, prior to audit or settlement by the General Accounting Office, shall make

payments to the State in accordance with such certification, by transfers from the extended unemployment compensation account (as established by section 905 of the Social Security Act) [section 1105 of Title 42, the Public Health and Welfare] to the account of such State in the Unemployment Trust Fund.

(b) There are hereby authorized to be appropriated, without fiscal year limitation, to the extended unemployment compensation account, such sums as may be necessary to carry out the purposes of this subtitle. Amounts appropriated pursuant to the preceding sentence shall not be required to be repaid.

(c) There are hereby authorized to be appropriated from the general fund of the Treasury, without fiscal year limitation, such funds as may be necessary for purposes of assisting States (as provided in title III of the Social Security Act) [section 501 et

seq. of Title 42] in meeting the costs of administration of agreements under this subtitle.

DEFINITIONS

Sec. 605. For purposes of this subtitle-

(1) the terms "compensation", "regular compensation", "base period", "benefit year", "State", "State agency", "State law", and "week" shall have the meanings assigned to them under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 [section 205 Pub.L. 91-373, set out as a note under this section]; and

(2) the term "period of eligibility" means, with respect to any individual, any week which begins on or after September 12, 1982, and begins before April 1, 1985 (except as otherwise provided in section 602(f)(2)(B)) except

that an individual shall not have a period of eligibility unless-

(A) his benefit year ends on or after June 1, 1982, or

(B) such individual was entitled to extended compensation for a week which begins on or after June 1, 1982.

FRAUD AND OVERPAYMENTS

Sec. 606. (a)(1) If an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of Federal supplemental compensation under this subtitle to which he was also entitled, such individual-

(A) shall be ineligible for further Federal supplemental compensation under this subtitle in accordance with the provisions of the applicable State unemployment compensation law relating to fraud in connection with a claim for unemployment compensation; and

(B) shall be subject to prosecution under section 1001 of title 18, United States Code [section 1001 of Title 18, Crimes and Criminal Procedure].

(2)(A) In the case of individuals who have received amounts of Federal supplemental compensation under this subtitle to which they were not entitled, the State is authorized to require such individuals to repay the amounts of such Federal supplemental compensation to the State agency, except that the State agency may waive such repayment if it determines that-

(i) the payment of such Federal supplemental compensation was without fault on the part of any such individual, and

(ii) such repayment would be contrary to equity and good conscience.

(B) The State agency may recover the amount to be repaid, or any part thereof, by deductions from any Federal supplemental compensation payable to such individual under this subtitle or from any unemployment compensation law administered by the State agency or under any other Federal law administered by the State agency which provides for the payment of any assistance or allowance with respect to any week of unemployment during the three-year period after the date such individuals received the payment of the Federal supplemental compensation to which they were not entitled, except that no single deduction may

exceed 50 per centum of the weekly benefit amount from which such deduction is made.

(C) No repayment shall be required and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final.

(3) Any determination by a State agency under paragraph (1) or (2) shall be subject to review in the same manner and to the same extend as determinations under the State unemployment compensation law, and only in that manner and to that extent.

§ 3305. Applicability of State law

(a) **Interstate and foreign commerce.-** No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does

not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.

(b) **Federal instrumentalities in general.**- The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306(c)(6) applies), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 and (except as provided in section 5240 of the Revised Statutes, as amended (12 U.S.C., sec. 484), and as modified by subsection (c)), to comply otherwise with such law. The permission granted in this subsection shall apply (A) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on

account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk; (B) only if such State law makes provision for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event such State is not certified by the Secretary of Labor under section 3304 with respect to such year; and (C) only if such State law makes provision

for the payment of unemployment compensation to any employee of any such instrumentality of the United States in the same amount, on the same terms, and subject to the same conditions as unemployment compensation is payable to employees of other employers under the State unemployment compensation law.

(c) **National banks.**- Nothing contained in section 5240 of the Revised Statutes, as amended (12 U.S.C. 484), shall prevent any State from requiring any national banking association to render returns and reports relative to the association's employees, their remuneration and services, to the same extent that other persons are required to render like returns and reports under a State law requiring contributions to an unemployment fund. The Comptroller of the Currency shall, upon receipt of a copy of any such return or report of a national banking association from, and upon request of, any duly authorized official,

body, or commission of a State, cause an examination of the correctness of such return or report to be made at the time of the next succeeding examination of such association, and shall thereupon transmit to such official, body, or commission a complete statement of his findings respecting the accuracy of such returns or reports.

(d) **Federal property.**- No person shall be relieved from compliance with a State unemployment compensation law on the ground that services were performed on land or premises owned, held or possessed by the United States, and any State shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States.

[(e) Repealed. Sept. 1, 1954, c. 1212, § 4(c), 68 Stat. 1135]

(f) **American vessels.-** The legislature of any State in which a person maintains the operating office, from which the operations of an American vessel operating on navigable waters within or within and without the United States are ordinarily and regularly supervised, managed,directed and controlled, may require such person and the officers and members of the crew of such vessel to make contributions to its unemployment fund under its State unemployment compensation law approved by the Secretary of Labor under section 3304 and otherwise to comply with its unemployment compensation law with respect to the service performed by an officer or member of the crew on or in connection with such vessel to the same extent and with the same effect as though such service was performed entirely within such State. Such person and the officers and members of the crew of such vessel shall not be required to

make contributions, with respect to such service,to the unemployment fund of any other State. The permission granted by this subsection is subject to the condition that such service shall be treated, for purposes of wage credits given employees, like other service subject to such State unemployment compensation law performed for such person in such State, and also subject to the same limitation, with respect to contributions required from such person and from the officers and members of the crew of such vessel, and is imposed by the second sentence (other than clause (B) thereof) of subsection (b) with respect to contributions required from instrumentalities of the United States and from individuals in their employ.

(g) **Vessels operated by general agents of United States.-** The permission granted by subsection (f) shall apply in the same manner and under the same conditions (including the

obligation to comply with all requirements of State unemployment compensation laws) to general agents of the Secretary of Commerce with respect to service performed by officers and members of the crew on or in connection with American vessels-

(1) owned by or bareboat chartered to the United States, and

(2) whose business is conducted by such general agents.

As to any such vessel, the State permitted to require contributions on account of such service shall be the State to which the general agent would make contributions if the vessel were operated for his own account. Such general agents are designated, for this purpose, instrumentalities of the United States neither wholly nor partially owned by it and shall not be exempt from the tax imposed by section 3301. The permission granted by this subsection is subject to the

same conditions and limitations as are imposed in subsection (f), except that clause (B) of the second sentence of subsection (b) shall apply.

(h) **Requirement by State of contributions.**- Any state may, as to service performed on account of which contributions are made pursuant to subsection (g)-

(1) require contributions from persons performing such service under its unemployment compensation law or temporary disability insurance law administered in connection therewith, and

(2) require general agents of the Secretary of Commerce to make contributions under such temporary disability insurance law and to make such deductions from wages or remuneration as are required by such unemployment compensation or temporary disability insurance law.

(i) **General agent as legal entity.-** Each general agent of the Secretary of Commerce making contributions pursuant to subsection (g) or (h) shall, for purposes of such subsections, be considered a legal entity in his capacity as an instrumentality of the United States, separate and distinct from his identity as a person employing individuals on his own account.

(ii) **Denial of credits in certain cases.-** Any person required, pursuant to the permission granted by this section, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 shall not be entitled to the credits permitted, with respect to the unemployment compensation law of a State, by subsections (a) and (b) of section 3302 against the tax imposed by section 3301 for any taxable year if, on October 31 of such taxable year, the Secretary

of Labor certifies to the Secretary of the Treasury his finding, after reasonable notice and opportunity for hearing to the State agency, that the unemployment compensation law of such State is inconsistent with any one or more of the conditions on the basis of which such permission is granted or that, in the application of the State law with respect to the 12-month period ending on such October 31, there has been a substantial failure to comply with any one or more of such conditions. For purposes of section 3310, a finding of the Secretary of Labor under this subsection shall be treated as a finding under section 3304(c).

§ 3306. Definitions

(a) **Employer.-** For purposes of this chapter-

(1) **In general.-** The term "employer" means, with respect to any calendar year, any person who-

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $1,500 or more, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day.

For purposes of this paragraph, there shall not be taken into account any wages paid to, or employment of, an employee performing domestic services referred to in paragraph (3).

(2) **Agricultural labor.-** In the case of agricultural labor, the term "employer" means, with respect to any calendar year, any person who-

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $20,000 or more for agricultural labor, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day.

(3) **Domestic service.-** In the case of domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, the term "employer" means, with respect to any calendar year, any person who during any calendar quarter in the calendar year or the preceding calendar year paid wages

in cash of $1,000 or more for such service.

(4) **Special rule.-** A person treated as an employer under paragraph (3) shall not be treated as an employer with respect to wages paid for any service other than domestic service referred to in paragraph (3) unless such person is treated as an employer under paragraph (1) or (2) with respect to such other service.

(b) **Wages.-** For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include-

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraph of this subsection) equal

to $7,000 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this

subsection) with respect to employment equal to $7,000 to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their

dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of-

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workmen's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death;

[(3) Repealed. Pub.L. 98-21, Title III, § 324(b)(3)(B), Apr. 20, 1983, 97 Stat. 124.]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection

with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary-

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in section 3121(v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or

all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974; or

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(6) the payment by an employer (without deduction from the remuneration of the employee)-

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's grade or business;

[(8) Repealed. Pub.L. 98-21, Title III, § 324(b)(3)(B), Apr. 20, 1983, 97 Stat. 124]

(9) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is

allowable under section 217 (determined without regard to section 274(n));

(10) any payment or series of payments by an employer to an employee or any of his dependents which is paid-

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(11) remuneration for agricultural labor paid in any medium other than cash;

(12) any contribution, payment, or service, provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 (relating to amounts received under qualified group legal services plans);

(13) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127 or 129;

(14) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee

will be able to exclude such items from income under section 119;

(15) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died; or

(16) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 117, or 132.

Except as other provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages. Nothing in the regulations prescribed for purposes of chapter 24 (relat-

ing to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter.

(c) **Employment.-** For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing; him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee

is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (i)(3)), except

(1) agricultural labor (as defined in subsection (k)) unless-

(A) such labor is performed for a person who-

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals

employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)), or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being a different calendar week, employed in agricultural labor (including labor performed by an alien referred to in subparagraph (B)) for some portion of the day (whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed before January 1, 1993, by an individual who is an alien admitted to the United States to perform agricultural

labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of $1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual

shall be deemed to be regularly employed by an employer during a calendar quarter only if-

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is-

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is

wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);

(10)(A) service performed in any calendar quarter in the employ of any

organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than $50, or

(B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance, or

(C) service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers, or

(D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee of a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government-

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign

country by employees of the United States Government and of instrumentalities thereof;

(13) services performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except-

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the

register tonnage of merchant vessels under the laws of the United States);

(18) service described in section 3121(b)(20));

(19) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), or (M) of section 101(a)(15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(F), (J), or (M)), and which is performed to carry out the purpose specified in subparagraph (F), (J), or (M), as the case may be; or

(20) service performed by a full time student (as defined in subsection (q)) in the employ of an organized camp-

(A) if such camp-

(i) did not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year, or

(ii) had average gross receipts for any 6 months in the preceding calendar year which were not more than 33-1/3 percent of its average gross receipts for the other 6 months in the preceding calendar year; and

(B) if such full time student performed services in the employ of such camp for less than 13 calendar weeks in such calendar year.

(d) **Included and excluded service.-** For purposes of this chapter, if the services performed during one-half or more of any pay

period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (c)(9).

(e) **State agency.-** For purposes of this chapter, the term "State agency" means any

State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(f) **Unemployment fund.-** For purposes of this chapter, the term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act, as amended (42 U.S.C. 1104), shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by such State agency. An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year, or such portion of the year as the unemployment fund was in exis-

tence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that-

(1) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;

(2) the amounts specified by section 903(c)(2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices, and

(3) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act.

(g) **Contributions.-** For purposes of this chapter, the term "contributions" means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.

(h) **Compensation.-** For purposes of this chapter, the term "compensation" means cash benefits payable to individuals with respect to their unemployment.

(i) **Employee.-** For purposes of this chapter, the term "employee" has the meaning assigned to such term by section 3121(d), except that paragraph (4) and subparagraphs (B) and (C) of paragraph (3) shall not apply.

(j) **State, United States, and American employer.-** For purposes of this chapter-

(1) **State.-** The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(2) **United States.-** The term "United States" when used in a geographical sense includes the States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(3) **American employer.-** The term "American employer" means a person who is

(A) an individual who is a resident of the United States,

(B) a partnership, if two-thirds or more of the partners are residents of the United States,

(C) a trust, if all of the trustees are residents of the United States, or

(D) a corporation organized under the laws of the United States or of any State.

An individual who is a citizen of the Commonwealth of Puerto Rico or the Virgin Islands (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

(i) **Agricultural labor.-** For purposes of this chapter, the term "agricultural labor" has the meaning assigned to such term by subsection (g) of section 3121; except that for purposes of this chapter subparagraph (B) of paragraph (4) of such subsection (g) shall be treated as reading:

"(B) in the employ of a group of operators of farms (or a coopera-

tive organization of which such operators are members) in the performance of service described in subparagraph (A), but only if such operators produced more than one-half of the commodity with respect to which such service is performed;".

[(l) Repealed. Sept. 1, 1954, c. 1212, § 4(c), 68 Stat. 1135]

(m) **American vessel and aircraft.-** For purposes of this chapter, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States

or of any State; and the term "American aircraft" means an aircraft registered under the laws of the United States.

(n) **Vessels operated by general agents of United States.-** Notwithstanding the provisions of subsection (c)(6), service performed by officers and members of the crew of a vessel which would otherwise be included as employment under subsection (c) shall not be excluded by reason of the fact that it is performed on or in connection with an American vessel-

(1) owned by or bareboat chartered to the United States and

(2) whose business is conducted by a general agent of the Secretary of Commerce.

For purposes of this chapter, each such general agent shall be considered a legal entity in his capacity as such general agent, separate and distinct from his identity as

a person employing individuals on his own account, and the officers and members of the crew of such an American vessel whose business is conducted by a general agent of the Secretary of Commerce shall be deemed to be performing services for such general agent rather than the United States. Each such general agent who in his capacity as such is an employer within the meaning of subsection (a) shall be subject to all the requirements imposed upon an employer under this chapter with respect to service which constitutes employment by reason of this subsection.

(o) **Special rule in case of certain agricultural workers.-**

(1) **Crew leaders who are registered or provide specialized agricultural labor.-**For purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person

shall be treated as an employee of such crew leader-

(A) if-

(i) such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or

(ii) substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(B) if such individual is not an employee of such other person within the meaning of subsection (i).

(2) **Other crew leaders.-** For purposes of this chapter, in the case of any individual who is furnished by a crew leader to perform agricultural labor for any other person and who is not treated as an employee of such crew leader under paragraph (1)-

(A) such other person and not the crew leader shall be treated as the employer of such individual; and

(B) such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his behalf or on behalf of such other person) for the agricultural labor performed for such other person.

(3) **Crew leader.-** For purposes of this subsection, the term "crew leader" means an individual who-

(A) furnishes individuals to perform agricultural labor for any other person,

(B) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and

(C) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(p) **Concurrent employment by two or more employers.-** For purposes of sections 3301, 3302, and 3306(b)(1), if two or more related corporations concurrently employ the same individual and compensate such individual

through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

(q) **Full time student.-** For purposes of subsection (c)(20), an individual shall be treated as a full time student for any period-

(1) during which the individual is enrolled as a full time student at an educational institution, or

(2) which is between academic years or terms if-

(A) the individual was enrolled as a full time student at an educational institution for the immedi-

ately preceding academic year or term, and

(B) there is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in subparagraph (A).

(r) **Treatment of certain deferred compensation and salary reduction arrangements.-**

(1) **Certain employer contributions treated as wages.-** Nothing in any paragraph of subsection (b) (other than paragraph (1) shall exclude from the term "wages"-

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent not included in gross income by reason of section 402(a)(8), or

(B) any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).

(2) **Treatment of certain nonqualified deferred compensation plans.-**

(A) **In general.-** Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter as of the later of-

(i) when the services are performed, or

(ii) when there is no substantial risk of forfeiture of the rights to such amount.

(B) **Taxed only once.-** Any amount taken into account as wages by

reason of subparagraph (A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter.

(C) **Nonqualified deferred compensation plan.-** For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (b)(5).

(s) **Tips treated as wages.-** For purposes of this chapter, the term "wages" includes tips which are-

(1) received while performing services which constitute employment, and

(2) included in a written statement furnished to the employer pursuant to section 6053(a).

SUBCHAPTER III--GRANTS TO STATES FOR UNEMPLOYMENT COMPENSATION ADMINISTRATION

§ 501. Use of available funds

The amounts made available pursuant to section 1101(c)(1)(A) of this title for the purpose of assisting the States in the administration of their unemployment compensation laws shall be used as hereinafter provided.

§ 502. Payments to States: computation of amounts

(a) The Secretary of Labor shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act, such amounts as the Secretary of Labor determines to be necessary for the proper and efficient administration of such law during the fiscal year for which such payment is to be made including 100 percent of so much of the reasonable expendi-

tures of the State as are attributable to the costs of the implementation and operation of the immigration status verification system described in section 1320b-7(d) of this title. The Secretary's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and of the cost of proper and efficient administration of such law; and (3) such other factors as the Secretary of Labor finds relevant. The Secretary of Labor shall not certify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year.

(b) Out of the sums appropriated therefor, the Secretary of the Treasury shall, upon receiving a certification under subsection (a) of this section, pay through the Fiscal Service of the Department of the Treasury and prior to audit or settlement by the General

Accounting Office, to the State agency charged with the administration of such law the amount so certified.

§ 503. State laws

(a) **Provisions required**

The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for-

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and

(2) Payment of unemployment compensation solely through public employment

offices or such other agencies as the Secretary of Labor may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 3305(b) of the Federal Unemployment Tax Act), immediately upon such receipt, to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 1104 of this title; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation exclusive of expenses of administra-

tion, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b) of the Federal Unemployment Tax Act; *Provided*, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: *Provided further*, That the amounts specified by section 1103(c)-(2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices: *Provided further*, That nothing in this paragraph shall be construed to prohibit deducting an amount from unemployment compensation otherwise

payable to an individual and using the amount so deducted to pay for health insurance if the individual elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor: *Provided further*, That amounts may be deducted from unemployment benefits and used to repay overpayments as provided in subsection (g) of this section; and

(6) The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports, and

(7) Making available upon request to any agency of the United States charged with the administration of public works

or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 502 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to section 502 of this title, which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary

of Labor for the proper administration of such State law.

(b) **Failure to comply; payments stopped** Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is-

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. Until he is so satisfied he shall make no further certifica-

tion to the Secretary of the Treasury with respect to such State: *Provided*, That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisdiction under such State law: *Provided further*, That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) **Denial of certification; availability of records to Railroad Retirement Board; cooperation with Federal agencies**

The Secretary of Labor shall make no certification for payment to any State if he finds, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law-

(1) that such State does not make its records available to the Railroad Retirement Board, and furnish to the

Railroad Retirement Board at the expense of the Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes;

(2) that such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law; or

(3) that any interest required to be paid on advances under subchapter XII of this chapter has not been paid by the date on which such interest is required to be paid or has been paid directly or indirectly (by an equivalent reduction in State unemployment taxes or otherwise) by such State from amounts in such State's unemployment fund, until such interest is properly paid.

(d) **Disclosure of unemployment compensation information; deduction and withholding**

of amounts owed to State food stamp agencies; reimbursement of administrative costs; non-compliance of State agency

(1) The State agency charged with the administration of the State law-

(A) shall disclose, upon request and on a reimbursable basis, to officers and employees of the Department of Agriculture and to officers or employees of any State food stamp agency any of the following information contained in the records of such State agency-

(i) wage information

(ii) whether an individual is receiving, has received, or has made application for, unemployment compensation, and the amount of any such compensation being received (or to be received) by such individual,

(iii) the current (or most recent) home address of such individual, and

(iv) whether an individual has refused an offer of employment and, if so, a description of the employment so offered and the terms, conditions, and rate of pay therefor, and

(B) shall establish such safeguards as are necessary (as determined by the Secretary of Labor in regulations) to insure that information disclosed under subparagraph (A) is used only for purposes of determining an individual's eligibility for benefits, or the amount of benefits, under the food stamp program established under the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.].

(2)(A) For purposes of this paragraph, the term "unemployment compensation" means any

unemployment compensation payable under the State law (including amounts payable pursuant to an agreement under a Federal unemployment compensation law).

(B) The State agency charged with the administration of the State law-

(i) may require each new applicant for unemployment compensation to disclose whether the applicant owes an uncollected overissuance (as defined in section 13(c)(1) of the Food Stamp Act of 1977 [7 U.S.C.A. § 2022(c)(1)]) of food stamp coupons,

(ii) may notify the State food stamp agency to which the uncollected overissuance is owed that the applicant has been determined to be eligible for unemployment compensation if the applicant discloses under clause (i) that the applicant owes an uncollected over-

issuance and the applicant is determined to be so eligible.

(iii) may deduct and withhold from any unemployment compensation otherwise payable to an individual-

(I) the amount specified by the individual to the State agency to be deducted and withheld under this clause,

(II) the amount (if any) determined pursuant to an agreement submitted to the State food stamp agency under section 13(c)(3)(A) of the Food Stamp Act of 1977 [7 U.S.C.A. § 2022(c)(3)(A)], or

(III) an amount otherwise required to be deducted and withheld from the unemployment compensation pursuant to section 13(c)(3)(B) of such Act [7 U.S.C.A. § 2022(c)(3)-(B)], and

(iv) shall pay any amount deducted and withheld under clause (iii) to the appropriate State food stamp agency.

(C) Any amount deducted and withheld under subparagraph (B)(iii) shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by the individual to the State food stamp agency to which the uncollected overissuance is owed as repayment of the individual's uncollected overissuance.

(D) A State food stamp agency to which an uncollected overissuance is owed shall reimburse the State agency charged with the administration of the State unemployment compensation law for the administrative costs incurred by the State agency under this paragraph that are attributable to repayment of uncollected overissuance to the State food stamp agency to which the uncollected overissuance is owed.

(3) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that there is a failure to comply substantially with the requirements of paragraph (1), the Secretary of Labor shall notify such State agency that further payments will not be made to the State until he is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, he shall make no further certification to the Secretary of the Treasury with respect to such State.

(4) For purposes of this subsection, the term "State food stamp agency" means any agency described in section 3(n)(1) of the Food Stamp Act of 1977 [7 U.S.C.A. § 2012(n)-(1)] which administers the food stamp program established under such Act.

(e) **Disclosure of wage information; non-compliance of State agency**

(1) The State agency charged with the administration of the State law-

(A) shall disclose, upon request and on a reimbursable basis, directly to officers or employees of any State or local child support enforcement agency any wage information contained in the records of such State agency, and

(B) shall establish such safeguards as are necessary (as determined by the Secretary of Labor in regulations) to insure that information disclosed under subparagraph (A) is used only for purposes of establishing and collecting child support obligations from, and locating, individuals owing such obligations.

For purposes of this subsection, the term "child support obligations" only includes obligations which are being enforced pursuant to a plan described in section 654 of this

title which has been approved by the Secretary of Health and Human Services under part D of subchapter IV of this chapter.

(2)(A) The State agency charged with the administration of the State law-

(i) shall require each new applicant for unemployment compensation to disclose whether or not such application owes child support obligations (as defined in the last sentence of paragraph (1)),

(ii) shall notify the State or local child support enforcement agency enforcing such obligations, if any applicant discloses under clause (i) that he owes child support obligations and he is determined to be eligible for unemployment compensation, that such applicant has been so determined to be eligible,

(iii) shall deduct and withhold from any unemployment compensation otherwise payable to an individual-

(I) the amount specified by the individual to the State agency to be deducted and withheld under this clause,

(II) the amount (if any) determined pursuant to an agreement submitted to the State agency under section 654(19)(B)(i) of this title, or

(III) any amount otherwise required to be so deducted and withheld from such unemployment compensation through legal process (as defined in section 662(e) of this title), and

(iv) shall pay any amount deducted and withheld under clause (iii) to the appropriate State or local child support enforcement agency.

Any amount deducted and withheld under clause (iii) shall for all purposes be treated as

if it were paid to the individual as unemployment compensation and paid by such individual to the State or local child support enforcement agency in satisfaction of his child support obligations.

(B) For purposes of this paragraph, the term "unemployment compensation" means any compensation payable under the State law (including amounts payable pursuant to agreements under any Federal unemployment compensation law).

(C) Each state or local child support enforcement agency shall reimburse the State agency charged with the administration of the State unemployment compensation law for the administrative costs incurred by such State agency under this paragraph which are attributable to child support obligations being enforced by the State or local child support enforcement agency.

(3) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing

to the State agency charged with the administration of the State law, finds that there is a failure to comply substantially with the requirements of paragraph (1) or (2), the Secretary of Labor shall notify such State agency that further payments will not be made to the State until he is satisfied that there is no longer any such failure. Until the Secretary of Labor is satisfied, he shall make no further certification to the Secretary of the Treasury with respect to such State.

(4) For purposes of this subsection, the term "State or local child support enforcement agency" means any agency of a State or political subdivision thereof operating pursuant to a plan described in the last sentence of paragraph (1).

(f) **Income and eligibility verification system**

The State agency charged with the administration of the State law shall provide that

information shall be required and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1320b-7 of this title.

(g) **Recovery of unemployment payments**

(1) A State may deduct from unemployment benefits otherwise payable to an individual an amount equal to any overpayment made to such individual under an unemployment benefit program of the United States or of any other State, and not previously recovered. The amount so deducted shall be paid to the jurisdiction under whose program such overpayment was made. Any such deduction shall be made only in accordance with the same procedures relating to notice and opportunity for a hearing as apply to the recovery of overpayments of regular unemployment compensation paid by such State.

(2) Any State may enter into an agreement with the Secretary of Labor under which-

(A) the State agrees to recover from unemployment benefits otherwise payable to an individual by such State any overpayments made under an unemployment benefit program of the United States to such individual and not previously recovered, in accordance with paragraph (1), and to pay such amounts recovered to the United States for credit to the appropriate account, and

(B) the United States agrees to allow the State to recover from unemployment benefits otherwise payable to an individual under an unemployment benefit program of the United States any overpayments made by such State to such individual under a State unemployment benefit program and not previously recovered,

in accordance with the same procedures as apply under paragraph (1).

(3) For purposes of this subsection, "unemployment benefits" means unemployment compensation, trade adjustment allowances, and other unemployment assistance.

(h) **Access by Secretary of Health and Human Services to wage and unemployment compensation claims information; suspension by Secretary of Labor of payments to State for noncompliance**

(1) The State agency charged with the administration of the State law shall take such actions (in such manner as may be provided in the agreement between the Secretary of Health and Human Services and the Secretary of Labor under section 653(e)(3) of this title) as may be necessary to enable the Secretary of Health and Human Services to obtain prompt access to any wage and

unemployment compensation claims information (including any information that might be useful in locating an absent parent or such parent's employer) for use by the Secretary of Health and Human Services, for purposes of section 653 of this title, in carrying out the child support enforcement program under subchapter IV of this chapter.

(2) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that there is a failure to comply substantially with the requirements of paragraph (1), the Secretary of Labor shall notify such State agency that further payments will not be made to the State until such Secretary is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, such Secretary shall make no further certification

to the Secretary of the Treasury with respect to such State.

(i) **Access to State employment records**

(1) The State agency charged with the administration of the State law-

(A) shall disclose, upon request and on a reimbursable basis, only to officers and employees of the Department of Housing and Urban Development and to representatives of a public housing agency, any of the following information contained in the records of such State agency with respect to individuals applying for or participating in any housing assistance program administered by the Department who have signed an appropriate consent form approved by the Secretary of Housing and Urban Development-

(i) wage information, and

(ii) whether an individual is receiving, has received, or has made application for, unemployment

compensation, and the amount of any such compensation being received (or to be received) by such individual, and

(B) shall establish such safeguards as are necessary (as determined by the Secretary of Labor in regulations) to ensure that information disclosed under subparagraph (A) is used only for purposes of determining an individual's eligibility for benefits, or the amount of benefits, under a housing assistance program of the Department of Housing and Urban Development.

(2) The Secretary of Labor shall prescribe regulations governing how often and in what form information may be disclosed under paragraph (1)(A).

(3) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the adminis-

tration of the State law, finds that there is a failure to comply substantially with the requirements of paragraph (1), the Secretary of Labor shall notify such State agency that further payments will not be made to the State until he or she is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, he or she shall make no future certification to the Secretary of the Treasury with respect to such State.

(4) For purposes of this subsection, the term "public housing agency" means any agency described in section 1437a(b)(6) of this title.

(5) The provision of this subsection shall cease to be effective beginning on October 1, 1994.

§ 1101. Employment Security Administration Account

(a) Establishment

There is hereby established in the Unemployment Trust Fund an employment security administration account.

(b) Amount credited to Account; transfer of funds; adjustments; repayment of internal revenue refunds

(1) There is hereby appropriated to the Unemployment Trust Fund for credit to the employment security administration account, out of any moneys in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1961, and for each fiscal year thereafter, an amount equal to 100 per centum of the tax (including interest, penalties, and additions to the tax) received during the fiscal year under the Federal Unemployment Tax Act [26 U.S.C.A. § 3301 et seq.] and covered into the Treasury.

(2) The amount appropriated by paragraph (1) shall be transferred at least monthly from the general fund of the Treasury to the Unemployment Trust Fund and credited to the employment security administration account. Each such transfer shall be based on estimates made by the Secretary of the Treasury of the amounts received in the Treasury. Proper adjustments shall be made in the amount subsequently transferred, to the extent prior estimates (including estimates for the fiscal year ending June 30, 1960), were in excess of or were less than the amounts required to be transferred.

(3) The Secretary of the Treasury is directed to pay from time to time from the employment security administration account into the Treasury, as repayments to the account for refunding internal revenue collections, amounts equal to all refunds made after June 30, 1960, of amounts received as

tax under the Federal Unemployment Tax Act [26 U.S.C.A. § 3301 et seq.] (including interest on such refunds).

(c) **Administrative expenditures; necessary expenses; quarterly transfer of funds; adjustments; limitation; estimate of net receipts**

(1) There are hereby authorized to be made available for expenditure out of the employment security administration account for the fiscal year ending June 30, 1971, and for each fiscal year thereafter-

(A) such amounts (not in excess of the applicable limit provided by paragraph (3) and, with respect to clause (ii), not in excess of the limit provided by paragraph (4)) as the Congress may deem appropriate for the purpose of-

(i) assisting the States in the administration of their unemployment compensation laws as provided

in subchapter III of this chapter (including administration pursuant to agreements under any Federal unemployment compensation law),

(ii) the establishment and maintenance of systems of public employment offices in accordance with the Act of June 6, 1933, as amended (29 U.S.C. secs. 49-49n), and

(iii) carrying into effect section 2003 of Title 38;

(B) such amounts (not in excess of the limit provided by paragraph (4) with respect to clause (iii)) as the Congress may deem appropriate for the necessary expenses of the Department of Labor for the performance of its functions under-

(i) this subchapter and subchapters III and XII of this chapter,

(ii) the Federal Unemployment Tax Act [26 U.S.C.A. § 3301 et seq.],

(iii) the provisions of the Act of June 6, 1933, as amended [29 U.S.C.A. § 49 et seq.],

(iv) chapter 41 (except section 2003) of Title 38, and

(v) any Federal unemployment compensation law.

The term "necessary expenses" as used in this subparagraph (B) shall include the expense of reimbursing a State for salaries and other expenses of employees of such State temporarily assigned or detailed to duty with the Department of Labor and of paying such employees for travel expenses, transportation of household goods, and per diem in lieu of subsistence while away from their regular duly stations in the State, at rates authorized by law for civilian employees of the Federal Government.

(2) The Secretary of the Treasury is directed to pay from the employment security

administration account into the Treasury as miscellaneous receipts the amount estimated by him which will be expended during a three-month period by the Treasury Department for the performance of its functions under-

(A) this subchapter and subchapters III and XII of this chapter, including the expenses of banks for servicing unemployment benefit payment and clearing accounts which are offset by the maintenance of balances of Treasury funds with such banks,

(B) the Federal Unemployment Tax Act [26 U.S.C.A. § 3301 et seq.], and

(C) any Federal unemployment compensation law with respect to which responsibility for administration is vested in the Secretary of Labor.

If it subsequently appears that the estimates under this paragraph in any particular period were too high or too low, appropriate adjust-

ments shall be made by the Secretary of the Treasury in future payments.

(3)(A) For purposes of paragraph (1)(A), the limitation on the amount authorized to be made available for any fiscal year after June 30, 1970, is except as provided in subparagraph (B) and in the second sentence of subsection (f)(3)(A) of this section, an amount equal to 95 percent of the amount estimated and set forth in the budget of the United States Government for such fiscal year as the amount by which the net receipts during such year under the Federal Unemployment Tax Act [26 U.S.C.A. § 3301 et seq.] will exceed the amount transferred under section 1105(b) of this title during such year to the extended unemployment compensation account.

(B) The limitation established by subparagraph (A) is increased by any unexpended amount retained in the employment security

administration account in accordance with subsection (f)(2)(B) of this section.

(C) Each estimate of net receipts under this paragraph shall be based upon a tax rate of 0.6 percent.

(4) For purposes of paragraph (1)(A)(ii) and (1)(B)(iii) the amount authorized to be made available out of the employment security administration account for any fiscal year after June 30, 1972, shall reflect the proportion of the total cost of administering the system of public employment offices in accordance with the Act of June 6, 1933, as amended [29 U.S.C.A. § 49 et seq.], and of the necessary expenses of the Department of Labor for the performance of its functions under the provisions of such Act, as the President determines is an appropriate charge to the employment security administration account, and reflects in his annual budget for such year. The President's determination,

after consultation with the Secretary, shall take into account such factors as the relationship between employment subject to State laws and the total labor force in the United States, the number of claimants and the number of job applicants, and such other factors as he finds relevant.

(d) **Additional tax attributable to reduced credits; transfer of funds**

(1) The Secretary of the Treasury is directed to transfer from the employment security administration account-

(A) To the Federal unemployment account, an amount equal to the amount by which-

(i) 100 per centum of the additional tax received under the Federal Unemployment Tax Act [26 U.S.C.a. § 3301 et seq.] with respect to any State by reason of the reduced credits provisions of

section 3302(c)(3) of such Act [26 U.S.C.A. § 3302(c)(3)] and covered into the Treasury for the repayment of advances made to the State under Section 1321 of this title, exceeds

(ii) the amount transferred to the account of such State pursuant to subparagraph (B) of this paragraph.

Any amount transferred pursuant to this subparagraph shall be credited against, and shall operate to reduce, that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(B) To the account (in the Unemployment Trust Fund) of the State with respect to which employers paid such additional tax, an amount equal to the amount by which such additional tax received and

covered into the Treasury exceeds that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(2) Transfers under this subsection shall be as of the beginning of the month succeeding the month in which the moneys were credited to the employment security administration account pursuant to subsection (b)(2) of this section.

(e) **Revolving fund; appropriations; advances to Account; repayment; interest**

(1) There is hereby established in the Treasury a revolving fund which shall be available to make the advances authorized by this subsection. There are hereby authorized to be appropriated, without fiscal year limitation, to such revolving fund such amounts as may be necessary for the purposes of this section.

(2) The Secretary of the Treasury is directed to advance from time to time from the revolving fund to the employment security administration account such amounts as may be necessary for the purposes of this section. If the net balance in the employment security administration account as of the beginning of any fiscal year equals 40 percent of the amount of the total appropriation by the Congress out of the employment security administration account for the preceding fiscal year, no advance may be made under this subsection during such fiscal year.

(3) Advances to the employment security administration account made under this subsection shall bear interest until repaid at a rate equal to the average rate of interest (computed as of the end of the calendar month next preceding the date of such advance) borne by all interest-bearing obligations of the United States then forming

a part of the public debt; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest shall be the multiple of one-eighth of 1 per centum next lower than such average rate.

(4) Advances to the employment security administration account made under this subsection, plus interest accrued thereon, shall be repaid by the transfer from time to time, from the employment security administration account to the revolving fund, of such amounts as the Secretary of the Treasury, in consultation with the Secretary of Labor, determines to be available in the employment security administration account for such repayment. Any amount transferred as a repayment under this paragraph shall be credited against, and shall operate to reduce, any balance of advances (plus accrued interest) repayable under this subsection.

(f) Determination of excess in Account; limitation on amount to be retained; use of balance in Account during certain fiscal years; net balance

(1) The Secretary of the Treasury shall determine as of the close of each fiscal year (beginning with the fiscal year ending June 30, 1961) the excess in the employment security administration account.

(2)(A) Except as provided in subparagraph (B), the excess in the employment security administration account as of the close of any fiscal year is the amount by which the net balance in such account as of such time (after the application of section 1102(b) of this title) and paragraph (3)(C) of this subsection exceeds the net balance in the employment security administration account as of the beginning of that fiscal year (including the fiscal year for which the excess is being computed) for which the net balance was higher

than as of the beginning of any other such fiscal year.

(B) With respect to the fiscal years ending June 30, 1970, June 30, 171, and June 30, 1972, the balance in the employment security administration account at the close of each such fiscal year shall not be considered excess but shall be retained in the account for use as provided in paragraph (1) of subsection (c) of this section.

(3)(A) The excess determined as provided in paragraph (2) as of the close of any fiscal year after June 30, 1972, shall be retained (as of the beginning of the succeeding fiscal year) in the employment security administration account until the amount in such account is equal to 40 percent of the amount of the total appropriation by the Congress out of the employment security administration account for the fiscal year for which the excess is determined. Three-eighths of the amount in

the employment security administration account as of the beginning of any fiscal year after June 30, 1972, or $150 million, whichever is the lesser, is authorized to be made available for such fiscal year pursuant to subsection (c)(1) of this section for additional costs of administration due to an increase in the rate of the insured unemployment for a calendar quarter of at least 15 percent over the rate of the insured unemployment for the corresponding quarter in the immediately preceding year.

(B) If the entire amount of the excess determined as provided in paragraph (2) as of the close of any fiscal year after June 30, 1972, is not retained in the employment security administration account, there shall be transferred (as of the beginning of the succeeding fiscal year) to the extended unemployment compensation account the balance of such excess or so much thereof as is

required to increase the amount in the extended unemployment compensation account to the limit provided in section 1105(b)(2) of this title.

(C) If as of the close of any fiscal year after June 30, 1972, the amount in the extended unemployment compensation account exceeds the limit provided in section 1105(b)-(2) of this title, such excess shall be transferred to the employment security administration account as of the close of such fiscal year.

(4) For the purposes of this section, the net balance in the employment security administration account as of any time is the amount in such account as of such time reduced by the sum of-

(a) the amounts then subject to transfer pursuant to subsection (d) of this section, and

(B) the balance of advances (plus interest accrued thereon) then repayable to the revolving fund established by subsection (e) of this section.

The net balance in the employment security administration account as of the beginning of any fiscal year shall be determined after the disposition of the excess in such account as of the close of the preceding fiscal year.

(g) **Transfers for calendar years 1988, 1989 and 1990**

(1) With respect to calendar years, 1988, 1989, and 1990, the Secretary of the Treasury shall transfer from the employment security administration account-

(A) to the Federal unemployment account an amount equal to 50 percent of the amount of tax received under section 3301(1) of Title 26 which is attributable to the differences in the tax rates (B) to the extended unemployment compensation

account an amount equal to 50 percent of such amount of tax received.between paragraphs (1) and (2) of such section; and

(2) Transfers under this subsection shall be as of the beginning of the month succeeding the month in which the moneys were credited to the employment security administration account pursuant to subsection (b)(2) of this section with respect to wages paid during such calendar years.

§ 1102. Transfers between Federal Unemployment Account and Employment Security Administration Account

(a) **Determination of excess; amount transferred**

Whenever the Secretary of the Treasury determines pursuant to section 1101(f) of this title that there is an excess in the employment security administration account as of the close of any fiscal year and the entire

amount of such excess is not retained in the employment security administration account or transferred to the extended unemployment compensation account as provided in section 1101(f)(3) of this title, there shall be transferred (as of the beginning of the succeeding fiscal year) to the Federal unemployment account the balance of such excess or so much thereof as is required to increase the amount in the Federal unemployment account to whichever of the following is the greater:

(1) $550 million, or

(2) the amount (determined by the Secretary of Labor and certified by him to the Secretary of the Treasury) equal to five-eights of 1 percent of the total wages subject (determined without any limitation on amount) to contributions under all State unemployment compensation laws for the calendar year ending during

the fiscal year for which the excess is determined.

(b) **Unemployment account excesses**

The amount, if any, by which the amount in the Federal unemployment account as of the close of any fiscal year exceeds the greater of the amounts specified in paragraphs (1) and (2) of subsection (a) of this section shall be transferred to the employment security administration account as of the close of such fiscal year.

(c) **Report to Congress**

Whenever the Secretary of Labor has reason to believe that in the next fiscal year the employment security administration account will reach the limit provided for such account in section 1101(f)(3)(A) of this title, and the Federal unemployment account will reach the limit provided for such account in subsection (a) of this section, and the extended unemployment compensation account

will reach the limit provided for such account in section 1105(b)(2) of this title, he shall, after consultation with the Secretary of the Treasury, so report to the Congress with a recommendation for appropriate action by the Congress.

§ 1103. Amounts transferred to State accounts

(a) **Determination and certification by Secretary of Labor**

(1) If as of the close of any fiscal year after the fiscal year ending June 30, 1972, the amount in the extended unemployment compensation account has reached the limit provided in section 1105(b)(2) of this title and the amount in the Federal unemployment account has reached the limit provided in section 1102(a) of this title and all advances and interest pursuant to section 1105(d) of this title and section 1323 of this title have been repaid, and there remains in the employ-

ment security administration account any amount over the amount provided in section 1101(f)(3)(A) of this title, such excess amount, except as provided in subsection (b) of this section, shall be transferred (as of the beginning of the succeeding fiscal year) to the accounts of the States in the Unemployment Trust Fund.

(2) Each state's share of the funds to be transferred under this subsection as of any October 1-

(A) shall be determined by the Secretary of Labor and certified by him to the Secretary of the Treasury before the date on the basis of reports furnished by the States to the Secretary of Labor before September 1, and

(B) shall bear the same ratio to the total amount to be so transferred as the amount of wages subject to contributions under such State's unemployment compensa-

tion law during the preceding calendar year which have been reported to the State before August 1 bears to the total of wages subject to contributions under all State unemployment compensation laws during such calendar year which have been reported to the States before August 1.

(b) **Transfer of funds where State is ineligible**

(1) If the Secretary of Labor finds that on October 1 of any fiscal year-

(A) a state is not eligible for certification under section 503 of this title, or

(B) the law of a State is not approvable under section 3304 of Title 26,

then the amount available for transfer to such State's account shall, in lieu of being so transferred, be transferred to the Federal unemployment account as of the beginning of such October 1. If, during the fiscal year

beginning on such October 1, the Secretary of Labor finds and certifies to the Secretary of the Treasury that such State is eligible for certification under section 503 of this title, that the law of such State is approvable under such section 3304, or both, the Secretary of the Treasury shall transfer such amount from the Federal unemployment account to the account of such State. If the Secretary of Labor does not so find and certify to the Secretary of the Treasury before the close of such fiscal year then the amount which was available for transfer to such State's account as of October 1 of such fiscal year shall (as of the close of such fiscal year) become unrestricted as to use as part of the Federal unemployment account.

(2) The amount which, but for this paragraph, would be transferred to the account of a State under subsection (a) of this section or paragraph (1) of this subsection

shall be reduced (but not below zero) by the balance of advances made to the State under section 1321 of this title. The sum by which such amount is reduced shall-

(A) be transferred to or retained in (as the case may be) the Federal unemployment account, and

(B) be credited against, and operate to reduce-

(i) first, any balance of advances made before September 13, 1960 to the State under section 1321 of this title, and

(ii) second, any balance of advances made on or after September 13, 1960 to the State under section 1321 of this title.

(c) **Use of funds**

(1) Except as provided in paragraph (2), amounts transferred to the account of a State pursuant to subsections (a) and (b) of this

section shall be used only in the payment of cash benefits to individuals with respect to their unemployment, exclusive of expenses of administration.

(2) A State may, pursuant to a specific appropriation made by the legislative body of the State, use money withdrawn from its account in the payment of expenses incurred by it for the administration of its unemployment compensation law and public employment offices if and only if-

(A) the purposes and amounts were specified in the law making the appropriation.

(B) the appropriation law did not authorize the obligation of such money after the close of the two-year period which began on the date of enactment of the appropriation law.

(C) the money is withdrawn and the expenses are incurred after such date of enactment, and

(D) the appropriation law limits the total amount which may be obligated during a twelve-month period (as prescribed in the law of the State), or during a transitional period of less than twelve months caused by a change in the twelve-month period (as prescribed in the law of the State), to an amount which does not exceed the amount by which (i) the aggregate of the amounts transferred to the account of such State pursuant to subsections (a) and (b) of this section during such twelve-month period or transitional period of less than twelve months and the thirty-four preceding twelve-month periods (including the transitional period of less than twelve months if it is within such

thirty-four twelve-month periods) exceeds (ii) the aggregate of the amounts used by the State pursuant to this subsection and charged against the amounts transferred to the account of such State during such thirty-four twelve-month periods (and the transitional period of less than twelve months if it is within the thirty-four twelve-month periods).

For purposes of subparagraph (D), amounts used by a State during any twelve-month period or transitional period of less than twelve months shall be charged against equivalent amounts which were transferred and which have not previously been so charged; except that no amount obligated for administration during any such period may be charged against any amount transferred during a twelve-month period or transitional period of less than twelve months earlier than the thirty-fourth preceding twelve-month period (including the

transitional period of less than twelve moths if it is within such thirty-four twelve-month periods).

(3)(A) If-

(i) amounts transferred to the account of a State pursuant to subsections (a) and (b) of this section were used in payment of unemployment benefits to individuals; and

(ii) the Governor of such State submits a request to the Secretary of Labor that such amounts be restored under this paragraph,

then the amounts described in clause (i) shall be restored to the status of funds transferred under subsections (a) and (b) of this section which have not been used by eliminating any charge against amounts so transferred for the use of such amounts in the payment of unemployment benefits.

(B) Subparagraph (A) shall apply only to the extent that the amounts described in clause (i) of such subparagraph do not exceed the amount then in the State's account.

(C) Subparagraph (A) shall not apply if the State has a balance of advances made to its account under subchapter XII of this title.

(D) If the Secretary of Labor determines that the requirements of this paragraph are met with respect to any request, the Secretary shall notify the Governor of the State that such requirements are met with respect to such request and the amount restored under this paragraph. Such restoration shall be as of the first day of the first month following the month in which the notification is made.

§ 1104. Unemployment Trust Fund

(a) **Establishment**

There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund", hereinafter

in this subchapter called the "Fund". The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund, or by the Railroad Retirement Board to the credit of the railroad unemployment insurance account or the railroad unemployment insurance administration fund, or otherwise deposited in or credited to the Fund or any account therein. Such deposit may be made directly with the Secretary of the Treasury, with any depositary designated by him for such purpose, or with any Federal Reserve Bank.

(b) **Investments**

It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations

guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at the issue price, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under chapter 31 of Title 31 are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that where such average rate is not a multiple of one-eight of 1 per centum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 per centum next lower than such average

rate. Obligations other than such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition. Advances made to the Federal unemployment account pursuant to section 1323 of this title shall not be invested.

(c) **Sale or redemption of obligations**

Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) **Treatment of interest and proceeds**

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) **Separate book accounts**

The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency, the employment security administration account, the Federal unemployment account, the railroad unemployment insurance account, and the railroad unemployment insurance administration fund and shall credit quarterly (on March 31, June 30, September 30, and December 31, of each year) to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date. For the purpose of this subsection, the average daily balance shall be computed-

(1) in the case of any State account, by reducing (but not below zero) the amount in the account by the balance of advances made to the State under section 1321 of this title, and

(2) in the case of the Federal unemployment account-

(A) by adding to the amount in the account the aggregate of the reductions under paragraph (1), and

(B) by subtracting from the sum so obtained the balance of advances made under section 1323 of this title to the account.

(f) **Payment to State agencies and Railroad Retirement Board**

The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment. The Secretary of the Treasury is authorized and directed to make such payments out of the railroad unemployment insurance account for the payment of benefits, and out of the railroad unemployment insurance

administration fund for the payment of administrative expenses, as the Railroad Retirement Board may duly certify, not exceeding the amount standing to the credit of such account or such fund, as the case may be, at the time of such payment.

(g) **Federal Unemployment Account; establishment; appropriations; unemployment administrative expenditures**

There is hereby established in the Unemployment Trust Fund a Federal unemployment account. There is hereby authorized to be appropriated to such Federal unemployment account a sum equal to (1) the excess of taxes collected prior to July 1, 1946, under title IX of this Act or under the Federal Unemployment Tax Act [26 U.S.C.A. § 3301 et seq.], over the total unemployment administrative expenditures made prior to July 1, 1946, plus (2) the excess of taxes collected under the Federal Unemployment Tax Act after June 30,

1946, and prior to July 1, 1953, over the unemployment administrative expenditures made after June 30, 1946, and prior to July 1, 1953. As used in this subsection, the term "unemployment administrative expenditures" means expenditures for grants under subchapter III of this chapter, expenditures for the administration of that subchapter by the Secretary of Health and Human Services, or the Secretary of Labor, and expenditures for the administration of title IX of this Act, or of the Federal Unemployment Tax Act, by the Department of the Treasury, the Secretary of Health and Human Services, or the Secretary of Labor. For the purposes of this subsection, there shall be deducted from the total amount of taxes collected prior to July 1, 1943, under title IX of this Act, the sum of $40,561,886.43 which was authorized to be appropriated by the Act of August 24, 1937 (50 Stat. 754) and the sum of $18,451,846

which was authorized to be appropriated by section 361(b) of Title 45.

§ 1105. Extended Unemployment Compensation Account

(a) **Establishment**

There is hereby established in the Unemployment Trust Fund an extended unemployment compensation account. For the purposes provided for in section 1104(e) of this title, such account shall be maintained as a separate book account.

(b) **Transfers to account**

(1) Except as provided by paragraph (3), the Secretary of the Treasury shall transfer (as of the close of July 1970, and each month thereafter), from the employment security administration account to the extended unemployment compensation account established by subsection (a) of this section, an amount determined by him to be equal, in the case of any month before April 1972, to one-fifth,

and in the case of any month after March 1972, to one-tenth of the amount by which-

(A) transfers to the employment security administration account pursuant to section 1101(b)(2) of this title during such month, exceed

(B) payments during such month from the employment security administration account pursuant to section 1101(b)(3) and (d) of this title.

If for any such month the payments referred to in subparagraph (B) exceed the transfers referred to in subparagraph (A), proper adjustments shall be made in the amounts subsequently transferred.

(2) Whenever the Secretary of the Treasury determines pursuant to section 1101(f) of this title that there is an excess in the employment security administration account as of the close of any fiscal year beginning after June 30, 1972, there shall be transferred (as

of the beginning of the succeeding fiscal year) to the extended unemployment compensation account the total amount of such excess or so much thereof as is required to increase the amount in the extended unemployment compensation account to whichever of the following is the greater:

(A) $750,000,000, or

(B) the amount (determined by the Secretary of Labor and certified by him to the Secretary of the Treasury) equal to three-eighth of 1 percent of the total wages subject (determined without any limitation on amount) to contributions under all State unemployment compensation laws for the calendar year ending during the fiscal year for which the excess is determined.

(3) The Secretary of the Treasury shall make no transfer pursuant to paragraph (1) as of the close of any month if he determines that

the amount in the extended unemployment compensation account is equal to (or in excess of) the limitation provided in paragraph (2).

(c) **Transfers to state accounts**

Amounts in the extended unemployment compensation account shall be available for transfer to the accounts of the States in the Unemployment Trust Fund as provided in section 204(e) of the Federal-State Extended Unemployment Compensation Act of 1970.

(d) **Advances to account; repayment**

There are hereby authorized to be appropriated, without fiscal year limitation, to the extended unemployment compensation account, as repayable advances, such sums as may be necessary to carry out the purposes of the Federal-State Extended Unemployment Compensation Act of 1970. Amounts appropriated as repayable advances shall be repaid, by transfers from the extended unemployment compensation account to the general fund of

the Treasury, at such times as the amount in the extended unemployment compensation account is determined by the Secretary of the Treasury, in consultation with the Secretary of Labor, to be adequate for such purpose. Repayments under the preceding sentence shall be made whenever the Secretary of the Treasury (after consultation with the Secretary of Labor) determines that the amount then in the account exceeds the amount necessary to meet the anticipated payments from the account during the next 3 months. Any amount transferred as a repayment under this subsection shall be credited against, and shall operate to reduce, any balance of advances repayable under this subsection.

Amounts appropriated as repayable advances for purposes of this subsection shall bear interest at a rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such

advance, borne by all interest bearing obligations of the United States then forming part of the public debt; except that in cases in which such average rate is not a multiple of one-eight of 1 percent, the rate of interest shall be the multiple of one-eighth of 1 percent next lower than such average rate.

THE ILLINOIS UNEMPLOYMENT INSURANCE ACT, Ill. Rev. Stat. Ch. 48

403. Maximum total amount of benefits

§ 403. Maximum total amount of benefits.

A. With respect to any benefit year beginning prior to September 30, 1979, any otherwise eligible individual shall be entitled, during such benefit year, to a maximum total amount of benefits as shall be determined in the manner set forth in this Act as amended and in effect on November 9, 1977.

B. With respect to any benefit year beginning on or after September 30, 1979, any otherwise eligible individual shall be entitled, during such benefit year, to a maximum total amount of benefits equal to 26 times his weekly benefit amount plus dependents allowances, or to the total wages for insured work paid to such individual during the individual's base period, whichever amount is smaller.

409. Extended benefits

§ 409. Extended benefits. A. For the purposes of this Section:

1. "Extended benefit period" means a period which begins with the third week after a week for which there is a State "on" indicator; and ends with either of the following weeks, whichever occurs later: (1) the third week after the first week for which there is a State "off" indicator, or (2) the thirteenth consecutive week of such period. No extended benefit period shall begin by reason of a State "on" indicator before the fourteenth week following the end of a prior extended benefit period.

2. There is a "State 'on' indicator" for a week if the Director determines, in accordance with the regulations of the United States Secretary of Labor or other appropriate Federal agency, that for the period consisting of such week and the immediately preceding

twelve weeks, the rate of insured unemployment (not seasonally adjusted) in this State (a) equaled or exceeded 4% and equaled or exceeded 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, or (b) equaled or exceeded 5%, for weeks beginning after September 25, 1982 (1) equaled or exceeded 5% and equaled or exceeded 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding 2 calendar years, or (2) equaled or exceeded 6 percent.

3. There is a "State 'off' indicator" for a week if the Director determines, in accordance with the regulations of the United States Secretary of Labor or other appropriate Federal agency, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment (not seasonally adjusted) in this State (a)

was less than 5% and was less than 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding 2 calendar year, or (b) was less than 4%; and for weeks beginning after September 25, 1982, (1) was less than 6% and less than 120% of the average of such rates for the corresponding 13-week period ending in each of the preceding 2 calendar years, or (2) was less than 5%.

4. "Rate of insured unemployment", for the purpose of paragraphs 2 and 3, means the percentage derived by dividing (a) the average weekly number of individuals filing claims for "regular benefits" in this State for weeks of unemployment with respect to the most recent 13 consecutive week period, as determined by the Director on the basis of his reports to the United States Secretary of Labor or other appropriate Federal agency, by (b) the average monthly employment covered

under this Act for the first four of the most recent six completed calendar quarters ending before the close of such 13-week period.

5. "Regular benefits" means benefits, other than extended benefits and additional benefits, payable to an individual (including dependents' allowances) under this Act or under any other State unemployment compensation law (including benefits payable to Federal civilian employees and ex-servicemen pursuant to 5 U.S.C. chapter 85).

6. "Extended benefits" means benefits (including benefits payable to Federal civilian employees and ex-servicemen pursuant to 5 U.S.C. chapter 85) payable to an individual under the provisions of this Section for weeks which begin in his eligibility period.

7. "Additional benefits" means benefits totally financed by a State and payable to exhaustees (as defined in subsection C) by reason of conditions of high unemployment or

by reason of other specified factors. If an individual is eligible to receive extended benefits under the provisions of this Section and is eligible to receive additional benefits with respect to the same week under the law of another State, he may elect to claim either extended benefits or additional benefits with respect to the week.

8. "Eligibility period" means the period consisting of the weeks in an individual's benefit year which begin in an extended benefit period and, if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

9. Notwithstanding any of the provisions of Sections 1404, 1405B, and 1501, no employer shall be liable for payments in lieu of contributions, and wages shall not become benefit wages, by reason of the payment of extended benefits which are wholly reimbursed to this State by the Federal Government. With

respect to extended benefits, paid prior to July 1, 1989, wages shall become benefit wages under Section 1501 only when an individual is first paid such benefits with respect to his eligibility period which are not wholly reimbursed to this State by the Federal Government. Extended benefits, paid on or after July 1, 1989, shall become benefit charges under Section 1501.1 only when any individual is paid such benefits with respect to his eligibility period which are not wholly reimbursed by the Federal Government.

B. An individual shall be eligible to receive extended benefits pursuant to this Section for any week which begins in his eligibility period if, with respect to such week (1) he has been paid wages for insured work during his base period equal to at least 1-1/2 times the wages paid in the calendar quarter of his base period in which such wages were highest, provided that this provision

applies only with respect to weeks beginning after September 25, 1982; (2) he has met the requirements of Section 500E of this Act; (3) he is an exhaustee; and (4) except when the result would be inconsistent with the provisions of this Section, he has satisfied the requirements of this Act for the receipt of regular benefits.

C. An individual is an exhaustee with respect to a week which begins in this eligibility period if:

1. Prior to such week (a) he has received, with respect to his current benefit year that includes such week, the maximum total amount of benefits to which he was entitled under the provisions of Section 403B, and all of the regular benefits (including dependents' allowances) to which he had entitlement (if any) on the basis of wages or employment under any other State unemployment compensation law; or (b) he has received all the regular

benefits available to him with respect to his current benefit year that includes such week, under this Act and under any other State unemployment compensation law, after a cancellation of some or all of his wage credits or the partial or total reduction of his regular benefits rights; or (c) his benefit year terminated, and he cannot meet the qualifying wage requirements of Section 500E of this Act or the qualifying wage or employment requirements of any other State unemployment compensation law to establish a new benefit year which would include such week or, having established a new benefit year that includes such week, he is eligible for regular benefits by reason of Section 607 of this Act or a like provision of any other State unemployment compensation law; and

2. For such week (a) he has no right to benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act,

or such other Federal laws as are specified in regulations of the United States Secretary of Labor or other appropriate Federal agency; and (b) he has not received and is not seeking benefits under the unemployment compensation law of Canada, except that if he is seeking benefits under such law, this clause shall not apply.

3. For the purposes of clauses (a) and (b) of paragraph 1 of this subsection, an individual shall be deemed to have received, with respect to his current benefit year, the maximum total amount of benefits to which he was entitled or all of the regular benefits to which he had entitlement, or all of the regular benefits available to him, as the case may be, even though (a) as a result of a pending reconsideration or appeal with respect to the "finding" defined in Section 701, or of a pending appeal with respect to wages or employment or both under any other State

unemployment compensation law, he may subsequently be determined to be entitled to more regular benefits; or (b) by reason of a seasonality provision in a State unemployment compensation law which establishes the weeks of the year for which regular benefits may be paid to individuals on the basis of wages in seasonal employment he may be entitled to regular benefits for future weeks but such benefits are not payable with respect to the week for which he is claiming extended benefits, provided that he is otherwise an exhaustee under the provisions of this subsection with respect to his rights to regular benefits, under such seasonality provision, during the portion of the year in which that week occurs; or (c) having established a benefit year, no regular benefits are payable to him with respect to such year because his wage credits were canceled or his rights to regular benefits were totally

reduced by reason of the application of a disqualification provision of a State unemployment compensation law.

D. 1. The provisions of Section 607 and the waiting period requirements of Section 500D shall not be applicable to any week with respect to which benefits are otherwise payable under this Section.

2. An individual shall not cease to be an exhaustee with respect to any week solely because he meets the qualifying wage requirements of Section 500E for a part of such week.

3. For the purposes of this Section, the "base period" referred to in Sections 601 and 602 shall be the base period with respect to the benefit year in which the individual's eligibility period begins.

E. With respect to any week which begins in his eligibility period, an exhaustee's "weekly extended benefit amount" shall be the same as his weekly benefit amount during his

benefit year which includes such week or, if such week is not in a benefit year, during his applicable benefit year, as defined in regulations issue by the United States Secretary of Labor or other appropriate Federal agency. If the exhaustee had more than one weekly benefit amount during his benefit year, his weekly extended benefit amount with respect to such week shall be the latest of such weekly benefit amounts.

F. An eligible exhaustee shall be entitled, during any eligibility period, to a maximum total amount of extended benefits equal to the lesser of the following amounts:

1. Fifty percent of the maximum total amount of benefits to which he was entitled under Section 403B during his applicable benefit year; or

2. Thirteen times his weekly extended benefit amount as determined under subsection E.

3. Notwithstanding subparagraphs 1 and 2 of this subsection F, and if the benefit year of an individual ends within an extended benefit period, the remaining balance of extended benefits that the individual would, but for this subsection F, be otherwise entitled to receive in that extended benefit period, for weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances as defined in the federal Trade Act of 1974 within that benefit year multiplied by his weekly benefit amount for extended benefits.

G. 1. A claims adjudicator shall examine the first claim filed by an individual with respect to his eligibility period and, on the basis of the information in his possession, shall make an "extended benefits finding".

Such finding shall state whether or not the individual has met the requirement of subsection B(1), is an exhaustee and, if he is, his weekly extended benefit amount and the maximum total amount of extended benefits to which he is entitled. The claims adjudicator shall promptly notify the individual of his "extended benefits finding", and shall promptly notify the individual's most recent employing unit, with respect to benefit years beginning on or after July 1, 1989 and the individual's last employer (referred to in Section 1502.1) that the individual has filed a claim for extended benefits. The claims adjudicator may reconsider his "extended benefits finding" at any time within one year after the close of the individual's eligibility period, and shall promptly notify the individual of such reconsideration finding. All of the provisions of this Act applicable to reviews from findings or reconsidered findings made

pursuant to Sections 701 and 703 which are not inconsistent with the provisions of this subsection shall be applicable to reviews from extended benefits findings and reconsidered extended benefits findings.

2. If, pursuant to the reconsideration or appeal with respect to a "finding", referred to in paragraph 3 of subsection C, an exhaustee is found to be entitled to more regular benefits and, by reason thereof, is entitled to more extended benefits, the claims adjudicator shall make a reconsidered extended benefits finding and shall promptly notify the exhaustee thereof.

H. Whenever an extended benefit period is to begin in this State because there is a State "on" indicator, or whenever an extended benefit period is to end in this State because there is a State "off" indicator, the Director shall make an appropriate public announcement.

I. Computations required by the provisions of paragraph 6 of subsection A shall be made by the Director in accordance with regulations prescribed by the United States Secretary of Labor, or other appropriate Federal agency.

J. 1. Interstate Benefit Plan means the plan approved by the Interstate Conference of Employment Security Agencies under which benefits shall be payable to unemployed individuals absent from the state (or states) in which benefit credits have been accumulated.

2. An individual who commutes from his state of residence to work in another state and continues to reside in such state of residence while filing his claim for unemployment insurance under this Section of the Act shall not be considered filing a claim under the Interstate Benefit Payment Plan so long as he files his claim in and continues to report to the employment office under the regulations

applicable to intrastate claimants in the state in which he was so employed.

3. "State" when used in this subsection includes States of the United States of America, the District of Columbia, Puerto Rico and the Virgin Islands. For purposes of this subsection, the term "state" shall also be construed to include Canada.

4. Notwithstanding any other provision of this Act, effective with weeks beginning on or after June 1, 1981 an individual shall be eligible for a maximum of 2 weeks of benefits payable under this Section after he files his initial claim for extended benefits in an extended benefit period, as defined in paragraph 1 of subsection A, under the Interstate Benefit Payment Plan unless there also exists an extended benefit period, as defined in paragraph 1 of subsection A, in the state where such claim is filed. Such maximum eligibility shall continue as long

as the individual continues to file his claim under the Interstate Benefit Payment Plan, notwithstanding that the individual moves to another state where an extended benefit period exists and files for weeks prior to his initial Interstate claim in that state.

5. To assure full tax credit to the employers of this state against the tax imposed by the Federal Unemployment Tax Act, the Director shall take any action or issue any regulations necessary in the administration of this subsection to insure that its provisions are so interpreted and applied as to meet the requirements of such Federal Act as interpreted by the United States Secretary of Labor or other appropriate Federal agency.

K. 1. Notwithstanding any other provisions of this Act, an individual shall be ineligible for the payment of extended benefits for any week of unemployment in his eligibility period if the Director finds that during such period:

a. he failed to accept any offer of suitable work (as defined in paragraph 3 below) or failed to apply for any suitable work to which he was referred by the Director; or

b. he failed to actively engage in seeking work as prescribed under paragraph 5 below.

2. Any individual who has been found ineligible for extended benefits by reason of the provisions of paragraph 1 of this subsection shall be denied benefits beginning with the first day of the week in which such failure has occurred and until he has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned remuneration equal to at least 4 times his weekly benefit amount.

3. For purposes of this subsection only, the term "suitable work" means, with respect to any individual, any work which is within such individual's capabilities, provided, however, that the gross average weekly

remuneration payable for the work must exceed the sum of:

a. the individual's extended weekly benefit amount as determined under subsection E above plus

b. the amount, if any, of supplemental unemployment benefits (as defined in Section 501(c)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and further,

c. pays wages not less than the higher of-

(i) the minimum wage provided by Section 6(a)(1) of the Fair Labor Standards Act of 1938, without regard to any exemption; or

(ii) the applicable state or local minimum wage;

d. provided, however, that no individual shall be denied extended benefits for failure to accept an offer of or apply for any job which meets the definition of suitability as described above if:

(i) the position was not offered to such individual in writing or was not listed with the employment service;

(ii) such failure could not result in a denial of benefits under the definition of suitable work for regular benefits claimants in Section 603 to the extent that the criteria of suitability in that Section are not inconsistent with the provisions of this paragraph 3;

(iii) the individual furnishes satisfactory evidence to the Director that his prospects for obtaining work in his customary occupation within a reasonably short period are good. If such evidence is deemed satisfactory for this purpose, the determination of whether any work is suitable with respect to such individual shall be made in accordance with the definition of suitable work for regular benefits in Section 603 without regard to the definition specified by this paragraph.

4. Notwithstanding the provisions of paragraph 3 to the contrary, no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions required by Section 3304(a)(5) of the Internal Revenue Code of 1954 and set forth herein under Section 603 of this Act.

5. For the purpose of subparagraph b of paragraph 1, an individual shall be treated as actively engaged in seeking working during any week if-

a. The individual has engaged in a systematic and sustained effort to obtain work during such week, and

b. the individual furnishes tangible evidence that he has engaged in such effort during such week.

6. The employment service shall refer any individual entitled to extended benefits under

this Act to any suitable work which meets the criteria prescribed in paragraph 3.

7. Notwithstanding any other provision of this Act, an individual shall not be eligible to receive extended benefits, otherwise payable under this Section, with respect to any week of unemployment in his eligibility period if such individual has been held ineligible for benefits under the provisions of Section 601, 602 or 603 of this Act until such individual had requalified for such benefits by returning to employment and satisfying the monetary requalification provision by earning at least his weekly benefit amount.

8. This subsection shall be effective for weeks beginning on or after March 31, 1981.

660. Handling of funds -- Bond -- Accounts

§ 2100. Handling of funds -- Bond -- Accounts. A. All contributions and payments in lieu of contributions collected under this

Act together with any interest thereon; all penalties collected pursuant to this Act; any property or securities acquired through the use thereof; all moneys advanced to this State's account in the unemployment trust fund pursuant to the provisions of Title XII of the Social Security Act, as amended; all moneys received from the federal tax avoidance surcharge established by Section 1506.4; all moneys received from the Federal government as reimbursements pursuant to Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, as amended; all moneys credited to this State's account in the unemployment trust fund pursuant to Section 903 of the Federal Social Security Act, as amended; and all earnings of such property or securities and any interest earned upon any such moneys shall be paid or turned over to and held by the Director, as ex-officio custodian of the clearing account,

the unemployment trust fund account and the benefit account, and by the State Treasurer as ex-officio custodian of the special administrative account, separate and apart from all public moneys or funds of this State, as hereinafter provided. Such moneys shall be administered by the Director exclusively for the purpose of this Act.

No such moneys shall be paid or expended except upon the direction of the Director in accordance with such regulations as he shall prescribe pursuant to the provisions of this Act.

The State Treasurer shall be liable on his general official bond for the faithful performance of his duties in connection with the moneys in the special administrative account provided for under this Act. Such liability on his official bond shall exist in addition to the liability upon any separate bond given by him. All sums recovered for

losses sustained by the account shall be deposited in that account.

The Director shall be liable on his general official bond for the faithful performance of his duties in connection with the moneys in the clearing account, the benefit account and unemployment trust fund account provided for under this Act. Such liability on his official bond shall exist in addition to the liability upon any separate bond given by him. All sums recovered for losses sustained by any one of the accounts shall be deposited in the account that sustained such loss.

The Treasurer shall maintain for such moneys a special administrative account. The Director shall maintain for such moneys 3 separate accounts: a clearing account, a benefit account and an unemployment trust fund account. All moneys payable under this Act (except moneys requisitioned from this State's account in the unemployment trust fund and

deposited in the benefit account), upon receipt thereof by the Director, shall be immediately deposited in the clearing account; provided, however, that except as is otherwise provided in this Section, interest and penalties shall not be deemed a part of the clearing account but shall be transferred immediately upon clearance thereof to the special administrative account.

After clearance thereof, all other moneys in the clearing account shall be immediately deposited by the Director with the Secretary of the Treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to the Federal Social Security Act, as amended.

The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. The moneys in the benefit account shall be expended in

accordance with regulations prescribed by the Director and solely for the payment of benefits, refunds of contributions, interest and penalties under the provisions of the Act, the payment of health insurance in accordance with Section 410 of this Act, and the transfer or payment of funds to any Federal or State agency pursuant to reciprocal arrangements entered into by the director under the provisions of Section 2700E, except that moneys credited to this State's account in the unemployment trust fund pursuant to Section 903 of the Federal Social Security Act, as amended, shall be used exclusively as provided in subsection B. The Director shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to the State's account therein, as he deems necessary solely for the payment of such benefits, refunds, and funds, for a reasonable future period.

The Director, as ex-officio custodian of the benefit account, which shall be kept separate and apart from all other public moneys, shall issue his checks for the payment of such benefits, refunds, health insurance and funds solely from the moneys so received into the benefit account. However, after January 1, 1987, no check shall be drawn on such benefit account unless at the time of drawing there is sufficient money in the account to pay the check. The Director shall retain in the clearing account an amount of interest and penalties equal to the amount of interest and penalties to be refunded from the benefit account. After clearance thereof, the amount so retained shall be immediately deposited by the Director, as are all other moneys in the clearing account, with the Secretary of the Treasury of the United States. If, at any time, an insufficient amount of interest and penalties is available for retention in

the clearing account, no refund of interest or penalties shall be made from the benefit account until a sufficient amount is available for retention as is so retained, or until the State Treasurer, upon the direction of the Director, transfers to the Director a sufficient amount from the special administrative account, for immediate deposit in the benefit account.

Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates of and may be utilized for authorized expenditures during succeeding periods, or, in the discretion of the Director, shall be redeposited with the Secretary of the Treasury of the United States to the credit of the State's account in the unemployment trust fund.

Moneys in the clearing, benefit and special administrative accounts shall not be commingled with other State funds but they shall be deposited as required by law and maintained in separate accounts on the books of a savings and loan association or bank.

No bank or savings and loan association shall receive public funds as permitted by this Section, unless it has complied with the requirements established pursuant to Section 6 of "An Act relating to certain investments of public funds by public agencies", approved July 23, 1943, as now or hereafter amended.

B. Moneys credited to the account of this State in the unemployment trust fund by the Secretary of the Treasury of the United States pursuant to Section 903 of the Social Security Act may not be requisitioned from this State's account or used except for the payment of benefits and for the payment of expenses incurred for the administration of this Act.

Any interest required to be paid on advances under Title XII of the Social Security Act shall be paid in a timely manner and shall not be paid directly or indirectly, by an equivalent reduction in contributions or payments in lieu of contributions from amounts in this State's account in the unemployment trust fund. Such moneys may be requisitioned pursuant to subsection A for the payment of benefits. Such moneys may also be requisitioned and used for the payment of expenses incurred for the administration of this Act, but only pursuant to a specific appropriation by the General Assembly and only if the expenses incurred and the moneys are requisitioned after the enactment of an appropriation law which:

1. Specifies the purpose or purposes for which such moneys are appropriated and the amount or amounts appropriated therefor;

2. Limits the period within which such moneys may be obligated to a period ending not more than 2 years after the date of the enactment of the appropriation law; and

3. Limits the amount which may be obligated during any fiscal year to an amount which does not exceed the amount by which (a) the aggregate of the amounts credited to the account of this State pursuant to Section 903 of the Social Security Act during the same fiscal year and the 34 preceding fiscal years, exceeds (b) the aggregate of the amounts obligated for administration and paid out for benefits and charged against the amounts credited to the account of this State during such 35 fiscal years.

Amounts credited to this State's account in the unemployment trust fund pursuant to Section 903 of the Social Security Act which are obligated for administration or paid out for benefits shall be charged against equiva-

lent amounts which were first credited and which are not already so charged; except that no amount obligated for administration during a fiscal year may be charged against any amount credited during a fiscal year earlier than the thirty-fourth preceding fiscal year.

Moneys appropriated as provided herein for the payment of expenses of administration shall be requisitioned by the Director as needed for the payment of obligations incurred under such appropriation. Upon receipt, such money shall be deposited with the State Treasurer, who shall hold such moneys, as ex-officio custodian thereof, in accordance with the requirements of Section 2103 and, upon the direction of the Director, shall make payments therefrom pursuant to such appropriation. Moneys so deposited shall until expended, remain a part of the unemployment trust fund and, if any will not be expended,

shall be returned promptly to the account of this State in the unemployment trust fund.

C. The Governor is authorized to apply to the United States Secretary of labor for an advance or advances to this State's account in the unemployment trust fund pursuant to the conditions set forth in Title XII of the Federal Social Security Act, as amended. The amount of any such advance may be repaid from this State's account in the unemployment trust fund provided that if the federal penalty tax avoidance surcharge established by Section 1506.4 is in effect for that year, any outstanding advance shall first be repaid from amounts in this State's account in the unemployment trust fund which were received from such surcharge by November 9 of each year.

661. Special administrative account

§ 2101. Special administrative account. Except as provided in Section 2100, all

interest and penalties collected pursuant to this Act shall be deposited in the special administrative account. The amount in this account in excess of $100,000 on the close of business of the last day of each calendar quarter shall be immediately transferred to this State's account in the unemployment trust fund. However, such funds shall not be transferred where it is determined by the Director that it is necessary to accumulate funds in the account in order to have sufficient funds to pay interest that may become due under the terms of Section 1202(b) of the Federal Social Security Act, as amended, upon advances made to the Illinois Unemployment Insurance Trust Fund under Title XII of the Federal Social Security Act or where it is determined by the Director that it is necessary to accumulate funds in the special administrative account in order to have sufficient funds to expend for any other

purpose authorized by this Section. The moneys available in the special administrative account shall be expended upon the direction of the Director whenever it appears to him that such expenditure is necessary for:

A. 1. The proper administration of this Act and no Federal funds are available for the specific purpose for which such expenditure is to be made, provided the moneys are not substituted for appropriations from Federal funds, which in the absence of such moneys would be available and provided the monies are appropriated by the General Assembly.

2. The proper administration of this Act for which purpose appropriations from Federal funds have been requested but not yet received, provided the special administrative account will be reimbursed upon receipt of the requested Federal appropriation.

B. To the extent possible, the repayment to the fund established for financing the cost of administration of this Act of moneys found by the Secretary of Labor of the United States of America, or other appropriate Federal agency, to have been lost or expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary of Labor, or other appropriate Federal agency, for the administration of this Act.

C. The payment of refunds or adjustments of interest or penalties, paid pursuant to Sections 901 or 2201.

D. The payment of interest on refunds of erroneously paid contributions, penalties and interest pursuant to Section 2201.1.

E. The payment or transfer of interest or penalties to any Federal or State agency, pursuant to reciprocal arrangements entered into by the Director under the provisions of Section 2700E.

F. The payment of any costs incurred, pursuant to Section 1700.1.

G. Beginning January 1, 1989, for the payment for the legal services authorized by subsection B of Section 802, up to $1,000,000 per year for the representation of the individual claimants and up to $1,000,000 per year for the representation of "small employers".

H. The payment of any fees collecting past due contributions, payments in lieu of contributions, penalties, and interest shall be paid (without an appropriation) form interest and penalty monies received from collection agents that have contracted with the Department under Section 2206 to collect such amounts, provided however, that the amount of such payment shall not exceed the amount of past due interest and penalty collected.

I. The payment of interest that may become due under the terms of Section 1202(b) of the Federal Social Security Act, as amended, for advances made to the Illinois Unemployment Insurance Trust Fund.

The Director shall annually on or before the first day of March report in writing to the Employment Security Advisory Board concerning the expenditures made from the special administrative account and the purposes for which funds are being accumulated.

If Federal legislation is enacted which will permit the use by the Director of some part of the contributions collected or to be collected under this Act, for the financing of expenditures incurred in the proper administration of this Act, then, upon the availability of such contributions for such purpose, the provisions of this Section shall be inoperative and interest and penalties

collected pursuant to his Act shall be deposited in and be deemed a part of the clearing account. In the event of the enactment of the foregoing Federal legislation, and within 90 days after the date upon which contributions become available for expenditure for costs of administration, the total amount in the special administrative account shall be transferred to the clearing account, and after clearance thereof shall be deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to the Federal Social Security Act, as amended.

663. Unemployment compensation administration cost

§ 2103. Unemployment compensation administration cost. All moneys received by the State or by the Director from any source for

the financing of the cost of the administration of this Act, including all Federal moneys allotted or apportioned to the State or to the Director for that purpose, including moneys received directly or indirectly from the federal government under the Job Training Partnership Act, and including moneys received from the Railroad Retirement Board as compensation for services or facilities supplied to said Board, or any moneys made available by this State or its political subdivisions and matched by moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, shall be received and held by the State Treasurer as ex-officio custodian thereof separate and apart from all other State moneys, and such funds shall be distributed or expended upon the direction of the Director and, except money received pursuant to the last paragraph of Section 2100B, shall be distributed or expended solely for the

purposes and in the amounts found necessary by the Secretary of Labor of the United States of America, or other appropriate Federal agency, for the proper and efficient administration of this Act. Notwithstanding any provision of this Section, all money requisitioned and deposited with the State Treasurer pursuant to the last paragraph of Section 2100B shall remain part of the unemployment trust fund and shall be used only in accordance with the conditions specified in the last paragraph of Section 2100B.

If any moneys received from the Secretary of Labor, or other appropriate Federal agency, under Title III of the Social Security Act, or any moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions of the Wagner-Peyser Act, are found by the Secretary of Labor, or other appropriate Federal agency,

because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of, those found necessary, by the Secretary of Labor, or other appropriate Federal agency, for the proper administration of this Act, it is the policy of this State that such moneys shall be replaced by moneys appropriated for such purpose from the general funds of this State for expenditure as provided in the first paragraph of this Section. The Director shall report to the Bureau of the Budget, in the same manner as is provided generally for the submission by State Departments of financial requirements for the ensuing fiscal year, and the Governor shall include in his budget report to the next regular session of the General Assembly, the amount required for such replacement.

Moneys in this fund shall not be commingled with other State funds, but they shall be

depcsited as required by law and maintained in a separate account on the books of a savings and loan association or bank.

The State Treasurer shall be liable on his general official bond for the faithful performance of his duties as custodian of such moneys as may come into his hands by virtue of this Section. Such liability on his official bond shall exist in addition to the liability upon any separate bond given by him. All sums recovered for losses sustained by the fund herein described shall be deposited therein.

Upon the effective date of this amendatory Act of 1987, the Comptroller shall transfer all unobligated funds from the Job Training Fund into the Title III Social Security and Employment Fund.

790. Moneys and increments to be sole source of benefits -- Non-priority of rights

§ 2900. Money and increments to be sole source of benefits -- Non-priority of rights. The moneys payable under this Act, together with increments thereon, shall be the sole and exclusive source for the payment of benefits payable hereunder, and such benefits shall be deemed to be due and payable only to the extent that such moneys payable under this Act with increments thereon, are available.

Nothing in this Act shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him either on his own behalf or on behalf of such individuals.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IRVING COSBY, et al., Plaintiffs, vs. SALLY WARD, Director of the Illinois Department of Employment Security, et al., Defendants.	)	No. 83 C 3116 Judge Frank H. Easterbrook District Judge pursuant to General Rule 2.30E

PARTIAL SETTLEMENT ORDER

Plaintiffs brought this class action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983, challenging certain policies and practices of the Illinois Department of Employment Security ("IDES") regarding two unemployment insurance programs: 1) the extended benefits ("EB") program; *see*, the Federal State Extended Unemployment Compensation Act of 1970, 26 U.S.C. §3304(a)-(11) note Pub. L. 91-373 (as amended) and Ill.

Rev. Stat. ch. 48, §409; and 2) the Federal Supplemental Compensation Program; *see* The Federal Supplemental Compensation Act of 1982, 26 U.S.C. §3304, note Pub. L. 97-248 (as amended).

Plaintiffs, IDES and the United States Department of Labor ("USDOL") have entered into a stipulation for entry of a proposed partial settlement order dated June 13, 1990, the original of which has been filed with this Court.

The Court has assessed the fairness and reasonableness of the proposed partial settlement order and has considered the possible benefits of litigation to the plaintiffs and members of the plaintiff class, as compared with the benefits offered by the partial settlement order. Having done so, the Court is of the opinion that, insofar as the partial settlement order resolves the competing interests of the parties to the

litigation, the partial settlement order represents a fair resolution of those competing interests. The court therefore has concluded that the partial settlement order is fair, reasonable and adequate, and should be and is approved pursuant to Fed. R. Civ. P. 23(e). Now, therefore, upon the stipulation for entry of a partial settlement order between the plaintiffs, IDES and USDOL, upon all prior proceedings and herein, and upon the consent of the parties hereto the Court, being fully advised in the premises, hereby APPROVES, ADJUDGES AND DECREES as follows:

I. **CLASS CERTIFICATION**

The Court has previously certified two classes pursuant to orders entered on June 24, 1983 and June 14, 1984. The classes consist of:

(1) All persons who have made, are making or will make claims to the Illinois Department of Employment

Security for Federal Supplemental Compensation pursuant to Pub. L. 97-248 (as amended) and who have been, are being, or will be denied FSC by IDES on the ground that they have been unavailable for and/or failed actively to seek work.

(2) All persons who have made, are making or will make claims to the Illinois Department of Employment Security for Extended Benefits pursuant to the Federal-State Unemployment Compensation Act of 1970, 26 U.S.C. §§3304(a)(11) and note, Pub. L. 91-373 (as amended), and who have been, are being or will be denied EB by IDES on the ground that they have been unavail-

able for and/or failed actively to seek work.[1]

II. DEFINITION OF TERMS

As used herein, the following terms have the meanings indicated:

---

[1] IDES was formerly the Bureau of Employment Security within the Illinois Department of Labor ("IDOL"). See Illinois Executive Order No. 2 (1984); P.A. 83-1503. All functions and responsibilities of IDOL pertaining to unemployment insurance matters were transferred to IDES. The two classes were originally certified as to persons who had made claims to IDOL. The classes are amended here to reflect the transfer of authority for unemployment insurance from IDOL to IDES. It is understood, however, that IDES shall be responsible for providing all relief set forth in this Partial Settlement Order for EB and FSC claimants who filed their claims with either IDOL or IDES.

1. "Plaintiffs" or "claimants" means the named plaintiffs and all members of the plaintiff classes as described in Section I of this order;

2. "EB" means extended unemployment insurance benefits as paid pursuant to the Federal State Extended Unemployment Compensation Act of 1970, 26 U.S.C. §3304(a)(11) note Pub. L. 91-373 (as amended) and Ill. Rev.Stat. ch. 48, §409.

3. "EB program" means the program for payment of benefits for weeks beyond the weeks of regular unemployment benefits, which additional weeks are paid pursuant to the Federal State Extended Unemployment Compensation Act of 1970, 26 U.S.C. §3304(a)(11) note Pub. L. 91-373 (as amended) and Ill. Rev. Stat. ch. 48, §409.

4. "IDES" means the Illinois Department of Employment Security and its predecessor,

the Bureau of Employment Security of the Illinois Department of Labor.

5. "FSC benefits" means federal supplemental compensation benefits paid pursuant to the Federal Supplemental Compensation Act of 1982, 26 U.S.C. §3304 note Pub. L. 97-248 (as amended).

6. "FSC Act" means the Federal Supplemental Compensation Act of 1982, 26 U.S.C. §3304 note Pub. L. 97-248 (as amended).

7. "Regular unemployment benefits" means the unemployment insurance paid pursuant to 42 U.S.C. §§501 *et seq.*, and Ill. Rev. Stat. ch. 48, §§300 *et seq.* (except *id.* at §409), without regard to whether the nation is experiencing a recession. Claimants in Illinois who are eligible for regular benefits are entitled to a maximum total amount of benefits equal to 26 times their weekly benefit amount, plus dependent allowances, or to the total wages for insured work paid

during the claimant's base period, whichever is smaller. Ill. Rev. Stat. ch. 48, §403 B.

8. "USDOL" means the United States Department of Labor.

9. "Work search requirement" means any test that IDES may use to adjudicate whether a claimant restricts his search for work and conducts a systematic and sustained search for work throughout each week of unemployment claimed.

III. PROSPECTIVE RELIEF

A. Notice of Claimants' Work Search Responsibilities

1. In the operation of the EB program, IDES shall provide written notice to claimants that includes a list of the particular work search requirements used to adjudicate a claimant's entitlement to EB. IDES shall provide such notice on a document entitled "Claimant's Work Search Responsibilities and Other Requirements for Extended Benefits"

(hereafter "Work Search Notice"). The form which IDES will use is attached as Exhibit A.

2. No claimant shall be held to have violated any work search requirement unless (s)he has been given written notice of any such requirement on a Work Search Notice in a sufficiently particularized way such that a reasonable person would understand the requirement, and prior to the week in which the claimant conducted the work search that is held to have violated a work search requirement.

By way of examples, if, to qualify for EB, a claimant must look for jobs that include ones that: 1) pay wages as low as a particular amount (e.g. minimum wage, $4.00 per hour), that amount shall be stated; 2) are a distance from the claimant's home that requires a particular travel time (e.g. 1 1/2 hours), that time period shall be stated; 3)

include particular shifts (e.g. any shift available), those shifts shall be expressly stated. Also, if a claimant is to look for a minimum number of jobs or to look for work in person, that shall be stated. (These examples are not intended to be inclusive. To the contrary, a claimant is to be notified of any particular work search requirement that (s)he is to meet.)

3. To meet the requirements of Section III.A.1 and 2 hereof, IDES may either give each claimant a Work Search Notice in which the responsibilities are developed specially for him, or it may give all claimants, or any groups of claimants, a Work Search Notice in which the responsibilities, although particular, are given to all members of the group without being developed specifically for any one claimant. The Work Search Notice attached as Exhibit A meets the requirements of Section III.A.1 and 2.

B. Notice of Issues at Adjudications or Hearings

1. When a claimant is notified of a claims adjudicator's interview or a referee's hearing to adjudicate a question as to whether the claimant has met a work search requirement(s), IDES shall give him notice of the issue(s) to be raised at the interview or hearing, prior to the interview or hearing. A list of the possible issues that can be raised at a claims adjudicator's interview is attached as Exhibit B. A list of the possible issues that can be raised at a referee's hearing is attached as Exhibit C.

2. A notice of the issues to be raised at claims adjudicators' interviews or referees' hearings shall state with reasonable particularity how the work search is alleged to be inadequate by reference to one or more of the requirements listed on the Work Search Notice.

C. Changes In Notice Forms

It is expressly understood and agreed that the forms attached hereto as Exhibits A through C may be altered by IDES for clarity or to meet changed program requirements. IDES need not obtain prior approval of either the court or the plaintiffs to make such alterations. However, IDES must provide particularized notice of work search responsibilities and of the issues to be raised at claims adjudicators' interviews and referees' hearings including any new or modified requirements.

IV. RETROACTIVE RELIEF

A. Agreement to Promptly Litigate the Question of Relief For Most Claimants

1. Except as set forth in subparagraph B hereof, neither IDES nor USDOL agrees to provide retroactive relief. For instance, neither IDES nor USDOL will agree to pay all,

or any part of any EB or FSC benefits to the named plaintiffs, or to members of the plaintiff class. In addition, neither IDES nor USDOL will agree to re-adjudicate such persons' claims to EB or FSC so as to pay those claimants that are thereby determined to have been eligible for such benefits. And neither IDES nor USDOL will agree to give notice to claimants that IDES violated their rights. (These examples are not meant to exhaust all the forms of retroactive relief that plaintiffs may request or that the Court may order.)

2. The named plaintiffs and class members continue to seek a declaratory judgment, payment of lost EB and FSC benefits, re-adjudication of their claims to EB and/or FSC, notice relief, and/or such other retroactive relief as the Court would allow. Therefore, they do not agree to waive, release

or in any way compromise their claims for retroactive relief.

3. The parties agree that they will litigate the issue of IDES' and/or USDOL's liability for retroactive relief. If they have not already done so, IDES and/or USDOL will move for dismissal as to the issue of their liability for benefits or re-adjudication of the claims within 30 days of the date hereof.

B. Agreement Promptly to Pay Retroactive Relief for Some Claimants

1. IDES and/or the USDOL agree to reconsider payment of benefits to those claimants who, as of the date of this partial settlement order, have pending cases in a county circuit court in Illinois, a district of the Illinois Appellate Court, any of the adjudicatory tribunals of IDES or any other court or similar administrative agency which adjudicates IDES' liability for EB or FSC.

In reconsidering these claims, IDES will consider whether the claimant conducted a work search consistent with the notice(s) (s)he actually received of his/her work search responsibilities. In making these determinations, IDES can look at the actual work search information that a claimant submitted, but a claimant's failure to comply with an unnoticed rule cannot constitute a basis for denial. Given the number of years which have passed since the work search certifications were completed, a claimant's failure to remember information not contained on the certification form cannot serve as a basis for denial. If a claim is approved, all outstanding weeks of EB and/or FSC that might have been paid will be paid whether or not the claimant in question filed certification forms for weeks after the week in which (s)he was denied. If a claim is denied, a claimant will have the benefit of the existing appeal

rights under Sections 800, 801, 803 and 1100 of the Illinois Unemployment Insurance Act, Ill. Rev. Stat. ch. 48 §§470, 471, 473, 520, and the Illinois Administrative Review Law, Ill. Rev. Stat. ch. 110, §§3-101 *et seq.*

2. IDES' agreement to reconsider payment of benefits, as provided in subsection IV.B hereof, shall not be construed as an admission as to any other liability for retroactive relief, and neither IDES nor the USDOL shall be limited in the presentation of any argument or defense to the plaintiffs' claims for retroactive relief as described in subsection IV.A by having agreed to the relief provided in subsection IV.B.

V. BINDING NATURE OF DECREE

This partial settlement order is binding upon the parties, their predecessors and successors in office, agents, employees, and persons in active concert or participation with them, but nothing in this partial

settlement order shall bind the USDOL or IDES to any matter not expressly agreed to in this partial settlement order or required by this partial settlement order and nothing herein shall be construed as violative of the decrees entered in *Soto v. Johnson*, 74 C 547 (N.D. Ill. 1977).

VI. RETAINED JURISDICTION AND ATTORNEYS' FEES

The Court shall retain jurisdiction over this cause for the purposes of: A) adjudicating the issue of IDES' and/or USDOL's liability for retroactive relief pursuant to paragraph IV.A hereof; B) adjudicating a petition for fees for work completed, if the parties have not agreed thereto, and/or for fees for the claims for retroactive relief, and/or for work completed after the date that this Partial Settlement Order is entered; and C) enforcement of this Partial Settlement Order and of any remedial order that might arise

from the adjudication of IDES' and/or USDOL's liability for retroactive relief.

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NO. 83 C 3116 **PARTIAL SETTLEMENT ORDER**

DATED: 8/15/90

ENTER: _____
FRANK H. EASTERBROOK
District Court Judge
pursuant to General
Rule 2.30E

EXHIBIT A

STATE OF ILLINOIS
DEPARTMENT OF EMPLOYMENT SECURITY

Si no puede leer este aviso, mire al reverso.

CLAIMANT'S WORK SEARCH RESPONSIBILITIES AND OTHER REQUIREMENTS FOR EXTENDED BENEFITS

The Extended Benefits (EB) program has been established to provide unemployment insurance benefits to eligible claimants who have exhausted their benefits on regular unemployment insurance (UI) claims. The program became effective on _____. Your EB weekly benefit amount will be the same as your regular weekly benefit amount. The following is a list of requirements that you must meet to be eligible for EB. If you do not understand any of the requirements, you should contact your local office immediately for a further explanation of these requirements. To be eligible for EB:

1. YOU MUST CONDUCT AN APPROPRIATE WORK SEARCH AS DISCUSSED BELOW:

a. You must register for work with the Illinois Job Service;

b. Every two weeks, you must report your work search on a certification form. The work search must include: a list of employers contacted with the names of the persons contacted and their telephone numbers or addresses; the dates of your contacts; your methods of contact; the kind of work you applied for; and the results of your contacts.

c. You are required to make a systematic and sustained effort to find work:

1) Your efforts to find work must be continuous throughout the week. On each normal work day, you must take some positive action to find work. If there is a day in which

you make no employer contacts, you must, for example, prepare a resume, contact a union or professional organization, attend an employment seminar, review the Illinois Job Service listings, etc.;

2) Your health or physical condition must be such that you are able to search for and perform work;

3) Your personal or domestic circumstances must permit you to search for and acdept work. For example, if you need child care to allow you to look for work, you must arrange for such care;

4) You must look for work that pays as little as the minimum wage or your weekly benefit amount including any supplemental unem-

ployment benefits (SUB PAY), whichever is more;

5) You must look for work that requires you to travel one way as long as 90 minutes from home to work. This may require you to use alternative means of transportation;

6) If you look for work in an occupation that uses more than one shift, you must apply for and accept any shift that is available;

7) You may continue to look for work in your customary occupation, but you may not limit your search solely to jobs in that occupation. For example, if you are a construction worker, you can look for work in the construction industry, but you must also look for other kinds of work;

8) Your work search methods must be realistic and appropriate considering the type of work you are seeking. For example, a factory worker does not ordinarily find employment by sending out resumes or by making phone calls, but applies in person;

9) Your search must be thorough. Repeated contacts with the same employer are not acceptable unless there is a reasonable prospect of obtaining work with that employer. If you are a union member, you cannot limit your contacts to the union hiring hall.

d. The systematic and sustained work search requirements do not apply to you if you are attending a training course approved by the Director of the Illinois Department of Employment Security. If you fail

to accept or continue in training which has been approved by the Director of the Illinois Department of Employment Security, you EB payments will be terminated if you do not make a systematic and sustained work search.

e. If you do not have a definite offer to begin work within four weeks you will be expected to accept any offer of work you are capable of doing.

IF YOU CLAIM EB FOR A WEEK WHEN YOU DO NOT MEET THE ABOVE REQUIREMENTS, YOU WILL BE INELIGIBLE FOR ALL FUTURE EB PAYMENTS UNTIL YOU HAVE WORKED AT LEAST 4 SEPARATE WEEKS AND HAVE EARNED AT LEAST 4 TIMES YOUR WEEKLY BENEFIT AMOUNT.

OTHER REQUIREMENTS:

2. You must also have exhausted your regular, interstate or combined wage claim. Your exhausted claim must have

a benefit year ending date of _____ or later.

3. You must also have met all of the eligibility requirements for the receipt of regular unemployment insurance benefits.

4. You must also have base period wages outside your highest quarter equal to or greater than 1-1/2 times your highest quarter wages.

Este aviso incluye informacion importante respecto a su derecho a recibir los beneficios extendidos de desempleo. Si usted no entiende este aviso es necesario que busque a alguien que se lo explique. Si necesitase ayuda adicional acuda inmediatamente a la oficina local en donde hizo su reclamacion de beneficios y pida que se lo expliquen.

307 EB NOTICE TO REPORT TO LOCAL OFFICE

FOR EXTENDED BENEFITS INTERVIEW

NOTICE TO REPORT TO LOCAL OFFICE

Si no puede leer este aviso,

mire al reverso

A question has been raised regarding your eligibility for extended unemployment insurance benefits under Section 409 of the Illinois Unemployment Act.

To resolve this question, it will be necessary for you to report for an interview on (Tickler Date) at DATA 27 Tickler Time. (If you reside outside the State of Illinois, report immediately to the nearest unemployment insurance office in the area you reside.)

YOU SHOULD BE PREPARED TO DISCUSS THE FOLLOWING ISSUE OR ISSUES:

-- whether you exhausted your regular, interstate, or combined wage claim.

__ whether your exhausted claim had a benefit year ending date of _____-___ or later.

-- whether you have met all of the requirements for the receipt of regular unemployment insurance benefits.

-- whether you have met all of the requirements for the receipt of regular unemployment insurance benefits.

-- whether you were paid base period wages outside your highest quarter equal to or greater than 1-1/2 times your highest quarter wages.

-- whether you registered for work with the Illinois Job Service.

-- whether you reported your work search on your bi-weekly certification form, including: a list of employers contacted with the names of the persons contacted and their phone numbers or addresses; the dates of your contacts; your methods

of contact; the kind of work you applied for; and the results of your contacts.

-- whether your efforts to find work were continuous throughout the week or weeks in question.

-- whether your health or physical condition enabled you to search for and perform work.

-- whether your personal or domestic circumstances permitted you to search for and accept work.

-- whether you looked for work that pays as little as the minimum wage or your weekly benefit amount.

-- whether you looked for work as much as 90 minutes one way from home to work and considered alternative means of transportation.

-- whether you looked for work on every available shift.

-- whether you looked for work outside your customary occupation.

-- whether your work search methods are realistic considering the type of work you were seeking.

-- whether your work search was limited to contacts with a union hiring hall.

-- whether your work search was limited to repeated contacts with the same employer(s) when there was no reasonable prospect of obtaining work with that employer(s).

-- whether you accepted or continued training approved by the Director of the Illinois Department of Employment Security.

-- whether you rejected a job offer for work you are capable of doing.

-- Free Form

Este aviso incluye informacion importante respecto a su derecho a recibir los beneficios

extendidos de desempleo. Si usted no entiende este aviso es necesario que busque a alguien que se lo explique. Si necesitase ayuda adicional acuda inmediatamente a la oficina local en donde hizo su reclamacion de beneficios y pida que se lo expliquen.

APPEALS NOTICE

Section of the Act: 409

Issue: Eligibility for Extended Benefits

-- whether the claimant exhausted his regular, interstate, or combined wage claim.

-- whether the claimant's exhausted claim had a benefit year ending date of _____ or later.

-- whether the claimant was paid base period wages outside his highest quarter equal to or greater than 1-1/2 times his highest quarter wages.

-- whether the claimant registered for work with the Illinois Job Service.

-- whether the claimant reported his work search on his bi-weekly certification form.

-- whether the cliamant included, in the report of his work search, a list of employers contacted with the names of

the persons contacted and their phone numbers or addresses; the dates of your contacts; your methods of contact; the kind of work you applied for; and the results of your contacts.

-- whether the claimant's efforts to find work were continuous throughout the week(s) in question.

-- whether the claimant's health or physical condition enabled him to search for and accept work.

-- whether the claimant's personal or domestic circumstances permitted him to search for and accept work.

-- whether the claimant looked for work paying as little as the minimum wage or the claimant's weekly benefit amount.

-- whether the claimant looked for work as much as 90 minutes one way from home to work and considered alternative means of transportation.

-- whether the claimant looked for work on every available shift.

-- whether the claimant looked for work outside his customary occupation.

-- whether the claimant's work search methods were realistic considering the type of work he was seeking.

-- whether the claimant's work search was limited to contacts with a union hiring hall.

-- whether the claimant's work search was limited to repeated contacts with the same employer(s) when there was no reasonable prospect of obtaining work with that employer(s).

-- whether the claimant accepted or continued training approved by the Director of the Illinois Department of Employment Security.

-- whether the claimant rejected a job offer for work he was capable of doing.

EXHIBIT C

-- Free Form

(4)

No. 91-577

Supreme Court, U.S.
FILED
DEC 9 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BONITA PASCHAL, DANIEL DODSON, PAUL BUCASAS and all others similarly situated,

Petitioners,

v.

LOLETA DIDRICKSON, the Director of the Illinois Department of Employment Security; STELLA CUTHBERT, the Commissioner of the Illinois Department of Employment Security; LYNN MARTIN, the Secretary of the United States Department of Labor; ROBERTS T. JONES, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Eleventh Amendment to the United States Constitution allow a judgment for restitution of funds against a State to persons whose claims for unemployment benefits have been resolved and closed?

2. Should *Hans v. Louisiana*, 134 U.S. 1 (1890), be overruled?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' statement of the case is clouded by argument and a basic misunderstanding of unemployment insurance law. The State of Illinois Respondents, Loleta Didrickson, the Director of the Illinois Department of Employment Security (the "Director" and the "IDES"), and Stella Cuthbert, the Commissioner of Unemployment Insurance of the IDES, can agree with the Petitioners' statement of the case, except as stated below.

I. THE STATUTORY FRAMEWORK

A. The Two Unemployment Insurance Programs At Issue

This case indeed concerns extended benefits and federal supplemental compensation benefits. Some general background in unemployment insurance is necessary for a full understanding of the case.

Unemployment insurance is surely a cooperative effort by the federal and state governments. Spawned by the passage of the Social Security Act, 42 U.S.C. §§ 501 *et seq.*, in the depression years, unemployment insurance was never intended to be, and it is not, a federal program. Rather, the states were induced to pass their own unemployment programs, and every state has done so. *See* Bernstein and Ramel, *The Illinois Unemployment Insurance Act*, 48 Ill.Ann.Stat., XIII, XIV (Smith-Hurd 1986).

The federal government does retain input into the state programs through various requirements. These requirements are generally designed to safeguard the state funds from which benefits are paid, solidify labor standards, and to help ensure efficiency in administration of unemployment programs. Bernstein and Ramel, 48 Ill.Ann.Stat. at XIX. Notwithstanding this, however, the states have wide

discretion in the administration of their unemployment insurance programs. *Id.* at XVII.

In Illinois, a claimant can receive, in each benefit year, a maximum amount in regular benefits equal to 26 times his weekly benefit amount plus dependency allowances, or to the total wages for insured work paid to the claimant during his base period, whichever is less. Ill. Rev. Stat. 1989, ch. 48, par. 403B. Regular benefits are those payable pursuant to the Illinois Unemployment Insurance Act (the "Act"), Ill. Rev. Stat. 1989, ch. 48, pars. 300 *et seq.*, or any other state unemployment law, other than extended benefits or additional benefits. *Id.* par. 409A.5.

Extended benefits ("EB") are payable pursuant to the various unemployment laws of each state, and not through a federal law. Similar to the "regular" unemployment program, the states were induced to pass the EB program through the enactment of federal legislation. In the case of EB, this was the passage of the Federal-State Extended Unemployment Compensation Act of 1970 ("EUCA"), 26 U.S.C. § 3304(a)(11), note Pub. L. 91-373, (as amended) §§ 201-207.

In Illinois, EB are those payable pursuant to section 409 of the Act. Ill. Rev. Stat. 1989, ch. 48, par. 409A.6. EB are only available when adverse economic conditions trigger an indicator "on," and end when conditions improve so as to switch EB "off." *Id.* par. 409A.1,2,3. The indicator has not been "on," and EB have not been payable in Illinois, since June, 1983. When "on," the Act provides for up to 13 weeks of extended benefits to exhaustees of regular benefits. *Id.* par. 409C,F.

Federal supplemental compensation ("FSC") benefits were payable pursuant to the Federal Supplemental Compensation Act of 1982 (the "FSC Act"), 26 U.S.C. § 3304,

note Pub. L. 97-248, (as amended) §§ 601-606. FSC benefits were paid by states, including Illinois, that entered into a contract to do so. FSC Act, § 602(a).

B. The Funding of Unemployment Insurance Benefits

Contrary to Petitioners' assertions, unemployment insurance benefits are not paid from the unemployment trust fund. Rather, in each state they are paid from state moneys or funds. In Illinois, they are paid from moneys assessed and collected from Illinois liable employers. Ill. Rev. Stat. 1989, ch. 48, par. 660. To be sure, the benefits moneys pass *through* the unemployment trust fund, but that is due to the nature and history of unemployment insurance.

In Illinois, unemployment insurance programs are administered through the IDES by the Director. Ill. Rev. Stat. 1989, ch. 48, par. 610. Unemployment benefits are funded by the assessment of contributions against Illinois liable employers. *Id.* pars. 550-581, 660; *People ex rel. Bernardi v. Bethune Plaza, Inc.*, 124 Ill. App.3d 791, 464 N.E.2d 1116, 1119 (1st Dist. 1984), *cert. denied*, 470 U.S. 1001 (1985); Bernstein and Ramel, 48 Ill. Ann. Stat. at XVIII.

All unemployment benefits, of whatever type, are paid by the IDES from these moneys so collected. Ill. Rev. Stat. 1989, ch. 48, par. 660. These moneys are first deposited by the Director into the "clearing account," one of the accounts maintained in the state's treasury for the administration of the unemployment insurance program. *Id.* pars. 660, 663.

After clearance, the Director deposits the moneys with the U.S. Secretary of the Treasury to the credit of Illinois' account in the unemployment trust fund. Ill. Rev.

Stat. 1989, ch. 48, par. 660; *see* 42 U.S.C. §§ 503(a)(4), 1104; 26 U.S.C. § 3306(f). Even though these moneys are deposited in a federal trust fund, they are kept in Illinois' account within that fund; until they are requisitioned by the IDES for the payment of benefits, they at all times are and "shall be deemed to be a part of the unemployment fund of the State [of Illinois]." 26 U.S.C. § 3306(f).

Unemployment benefits are paid from the "benefit account." Upon the requisition of the Director, money is transferred from Illinois' account in the federal unemployment trust fund to the benefit account. Ill. Rev. Stat. 1989, ch. 48, par. 660; *see* 42 U.S.C. § 1104(f); 26 U.S.C. § 3306(f).

If and when the federal unemployment trust fund ceases to exist, or separate accounts for each state are not maintained, Illinois' money in the fund shall immediately be transferred back to the Illinois State Treasurer to be held and used for unemployment benefits. Ill. Rev. Stat. 1989, ch. 48, par. 662.

If Illinois' moneys, in either the benefit account or in its account in the unemployment trust fund, are insufficient to pay benefits, Illinois may request an advance, *i.e.* borrow, from the U.S. Secretary of Labor. Ill. Rev. Stat. 1989, ch. 48, par. 660C. While the advance is repaid from Illinois' account in the unemployment trust fund, interest on the advance is payable from other state moneys. 42 U.S.C. § 1322(b)(5); *see* 42 U.S.C. § 503(c)(3); 26 U.S.C. §3304(a)(17).

The costs of administering an unemployment insurance program in Illinois are paid from either the "special administrative account" or the Title III Social Security and Employment Fund. Ill. Rev. Stat. 1989, ch. 48, pars. 661, 663.

The special administrative account consists of moneys collected by the IDES as and for interest and penalties from employers pursuant to the Act. Ill. Rev. Stat. 1989, ch. 48, par. 661; *see also id.* pars. 551-552. These moneys are used for certain administration costs and for various other purposes. *Id.* par. 661A-I.

Other administrative costs are paid through the Title III Social Security and Employment Fund. *Id.* par. 663. This fund receives moneys from the federal government.

At least part of the moneys raised by the federal government pursuant to the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301 *et seq.*, is appropriated by Congress to the employment security administration account in the unemployment trust fund. 42 U.S.C. § 1101(b)(1). Subject to that appropriation, moneys in that account are used "for the purpose of assisting the states in the administration" of their unemployment programs. 42 U.S.C. § 501.

The amount of money allocated to each state is such as the U.S. Secretary of Labor in her discretion "determines to be necessary for the proper and efficient administration" of the state's unemployment program during that fiscal year. 42 U.S.C. § 502; *see People ex rel. Bernardi v. Bethune Plaza, Inc., supra*, 464 N.E.2d at 1119. There is no requirement that these moneys be all or even a substantial portion of that necessary to run that state's program.

The EB program is a state unemployment program. EB are paid by the IDES out of its benefit account. Ill. Rev. Stat. 1989, ch. 48, par. 660. Pursuant to EUCA, § 204(a)(1)(A), the federal government reimburses Illinois for one-half of the EB it pays. Similar to regular benefits, Illinois is "assist[ed]" in meeting its EB administrative costs. *See* 42 U.S.C. §§ 501, 502, 1101(c)(1)(A)(i).

The IDES paid FSC benefits out of the benefit account, too. Ill. Rev. Stat. 1989, ch. 48, par. 660. Pursuant to the FSC Act, § 603(a), the federal government reimbursed Illinois for the FSC benefits it paid. The IDES also received some federal assistance for its administrative costs. *Id.* § 604(c).

II. THE DISPOSITION OF THE CASE BELOW

No court has ever made a final determination that the IDES violated the constitutional or statutory rights of the Petitioners or the classes they represent. Admittedly, the court of appeals in the first appeal did make a preliminary finding that the IDES violated the claimants' due process rights regarding notice of issues. *Cosby v. Ward*, 843 F.2d 967, 985-986 (7th Cir. 1988). But the trial was never finished to allow the IDES to rebut the evidence offered by the Petitioners. The IDES continues to strongly contest that finding.

The Partial Settlement Order did provide for other than prospective relief to a certain number of individuals. Those claimants whose unemployment benefit claims remained pending before a court or administrative agency had those claims remanded to and decided by the IDES. *Cosby v. Jackson*, 741 F. Supp. 740, 741 (N.D. Il. 1990); App. 531-533.

Petitioners mischaracterize the court of appeals decision, artfully spinning their arguments to that court into the courts holding. Petition at 18-22.

Thus, while the court did admit to "ample authority that recognizes that a lawsuit is not against a sovereign when the relief has no impact upon the state itself," App. 15, it did not agree with Petitioner's argument that the relief sought here would have "no impact." To the contrary,

the court recognized that all benefits, including EB and FSC benefits, are paid from Illinois' benefit account. App. 9, 12. The moneys in the benefit account are state funds. The court of appeals not only rejected the "trust fund doctrine," it rejected the attempt to bring this case into that doctrine.

Moreover, the court of appeals quite properly ignored the attempted distinction of two precedents from this Court, *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946) and *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944). The Petitioners make much of the "segregation" of unemployment moneys from the "general revenues" of the state, whatever that term may mean. That the unemployment moneys are held in separate accounts is not relevant to their character as state moneys; they merely are not "commingled with *other* state funds" (emphasis added). Ill. Rev. Stat. 1989, ch. 48, par. 660; App. 8. The lesson of *Kennecott* and *Great Northern* is that mere segregation is an "immaterial difference;" the important question is whether a judgment would be against the state. App. 20.

Finally, Petitioners again mischaracterize the court of appeals' decision when they state that the court acknowledged that any judgment would not come from "the state's revenues at all." Petition at 22. To the contrary, the court acknowledged that EB and FSC benefits come from Illinois' benefit account. App. 8-9, 12. These are state funds.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT'S RULING IS IN ACCORD WITH PRECEDENTS FROM THIS COURT

The key point in the Petitioners' argument for review by this Court is that the money used to pay unemployment benefits in Illinois are kept in separate accounts in the Illinois treasury. That is, they are "segregated" from other state moneys, which Petitioners refer to as the state's "general revenues." The argument proceeds that only these "general" moneys of the state are protected by the immunity given by the Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI. All "segregated" moneys, Petitioners claim, are amenable to judgment.

The court of appeals rejected that argument. App. 19. In that regard, the Seventh Circuit ruled in strict accordance with two longstanding precedents of this Court. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

In both of those cases the moneys at issue were segregated from the state's other funds. The Court held it to be an "immaterial difference" that the moneys were segregated, when the judgment would run against the state. *Great Northern*, 322 U.S. at 53.

Pointedly, the Seventh Circuit followed this Court's rulings in *Kennecott Copper* and *Great Northern*, App. 19. So did the Tenth Circuit in *Esparza v. Valdez*, 862 F.2d 788, 794 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989), a case very similar to the one at bar. In *Esparza*, the court also rejected the claim that the segregation of moneys to pay unemployment benefits took the case out from under the protection of the Eleventh Amendment, on the authority of *Kennecott Copper* and *Great Northern*.

In contrast, *none* of the alleged conflicting authorities cited on pages 24-26 of the Petition even refer to *Kennecott Copper* or *Great Northern*. It is those circuits which have ignored this Court's holdings on this point, and not the Seventh Circuit. There is simply no reason for this Court to review this case on this issue.

Petitioners also argue that the review of this Court is needed because the Seventh Circuit ignored the source of the moneys used to pay the unemployment benefits at issue here. Petitioners claim that the moneys used to fund unemployment benefits are federal, and not state, and therefore that sovereign immunity does not attach to them. In this regard, the ruling of the Seventh Circuit is said to conflict with precedents of this Court, Petition at 28-31, and cases from other circuits, Petition at 22-24.

This argument ignores two important differences in the case at bar. First, the clear and obvious fact is that all unemployment benefits in Illinois, including the EB and FSC benefits, are paid from *state* moneys, collected from Illinois employers and held in the benefit account in the state treasury. Ill. Rev. Stat. 1989, ch. 48, par. 660. The Seventh Circuit recognized this point. App. at 9, 12. The Petitioners have repeatedly failed to grasp it.

Second, as the court of appeals also recognized, a key point is that any judgment in this case would run against the State of Illinois. App. at 18; *see Edelman v. Jordan*, 415 U.S. 651, 665 (1974). Furthermore, such judgment "could have an impact on the state [of Illinois] treasury." App. at 18-19; *see Edelman*, 415 U.S. at 666, and n.11.

Therefore, the decision of the court of appeals here does not depart from the prior rulings of this Court, or differ

from decisions in other circuits, so as to merit further review by this Court.

II. *HANS v. LOUISIANA* SHOULD NOT BE OVERRULED

Petitioners seek to use this case as a vehicle to overrule *Hans v. Louisiana*, 134 U.S. 1 (1890). Several times in the recent past, this Court has reconsidered, but declined to overturn *Hans*. *E.g. Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Welch v. Texas State Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Petitioners have offered no new or compelling reasons for this Court to again consider *Hans*.

Indeed, Petitioners raise many of the same points, and refer to many of the same authorities, as have been raised before to this Court. *See, e.g. Pennsylvania v. Union Gas Co., supra*, 491 U.S. at 23 (Stevens, J. concurring). Thus, the Petitioners argue over the express terms of the Eleventh Amendment and the precise facts of the *Hans* case. Petition at 32-33, 35-37. They claim that the Court's decisions under *Hans* have created "substantial incoherence in the constitutional jurisprudence of sovereign immunity." Petition at 42. Again, Petitioners miss the point.

First, it is not clear that only *state* law claims are included within the immunity afforded by the Eleventh Amendment. To the contrary, the text of the amendment prohibits "*any* suit in law or equity." U.S. Const. amend. XI (emphasis added). This would include federal question suits. *Welch v. Texas Department of Highways and Public Transportation, supra*, 483 U.S. at 485.

Second, the significance of *Hans* lies not in its specific facts or the precise way that Louisiana was brought into

court. *Hans* was, and is, reflective of the concerns of the states. *Hans* was "enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the states retained their sovereign prerogative of immunity." *Pennsylvania v. Union Gas Co., supra*, 491 U.S. at 37 (Scalia, J., concurring in part and dissenting in part). The best answer to Petitioners' argument is perhaps found in *Hans* itself, 134 U.S. at 15:

> Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

Third, there is no incoherence in this Courts' sovereign immunity rulings. To the contrary, "the fundamental principle enunciated in *Hans* has been among the most stable in [this Court's] constitutional jurisprudence." *Welch v. Texas Department of Highways and Public Transportation, supra*, 483 U.S. at 486; *see Employees v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring in result).

Furthermore, the Petitioners' proposed solution—to allow suits against a state by its own citizens based on a federal question, and regardless of the type or nature of the relief sought—creates problems for the courts, the state governments and the federal government that far outweigh any purported benefit.

Thus, at a time when the federal courts are looking for ways to cut already crowded dockets, this "solution" would have the opposite effect. It would increase the caseload by allowing for lawsuits now barred from federal court.

Moreover, this is a time when governments of all types and levels are looking for ways to increase revenues, while avoiding additional tax levies and unexpected outlays of cash. Petitioners' proposal would frustrate this goal, and expose state governments to additional, unforeseen, and unbudgeted liability. To further exacerbate the situation, this liability would often impact the government after years of litigation—and years after the alleged violations have occurred.

Finally, Petitioners' "solution" would further strain the relationship between the federal and state governments. These two are often at loggerheads over revenues. To now allow federal suits against unconsenting states that may result in large monetary judgments against those states would assuredly further stress that relationship. Such judgments would need to be enforced, and this would again raise the "delicate problem of enforcing judgments against the states." *Welch v. Texas Department of Highways and Public Transportation*, *supra*, 483 U.S. at 482.

Accordingly, the State of Illinois Respondents submit that still another review of *Hans v. Louisiana* is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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U.S. CONST. amend. XI	passim
Federal-State Extended Unemployment Compensation Act of 1970, 26 U.S.C. § 3304 (1988), note Pub. L. 91-373 (as amended), §§ 201 et seq.	
§ 204	5
Federal Supplemental Compensation Act of 1982, 26 U.S.C. § 3304 (1988), note Pub. L. 97-248 (as amended), §§ 601 et seq.	
§ 603(a)	4-5
§ 604	4-5
Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3306 (1988 and Supp. I 1989)	5
26 U.S.C. § 3302	6
26 U.S.C. § 3303	6
26 U.S.C. § 3304(a)(3)	6
26 U.S.C. § 3304(a)(4)	6
Social Security Act §§ 301 et seq. (1988), 42 U.S.C. § 501 et seq.	
§ 303(a)(4), 42 U.S.C. § 503(a)(4)	6

§ 303(a)(5), 42 U.S.C.
§ 503(a)(5) 6

Illinois Unemployment Insurance
Act §§ 100 et seq., Ill. Rev.
Stat. ch. 48, ¶¶ 300 et seq.

§ 2100., Ill. Rev. Stat.
ch. 48, ¶ 660 6

RULES:

Sup. Ct. R. 10.1(a) 8-9

Sup. Ct. R. 10.1(c) 2, 12

No. 91-577

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

Bonita Paschal, Daniel Dodson, Paul Bucasas and all others similarly situated,

Petitioners,

v.

Loleta Didrickson, the Director of the Illinois Department of Employment Security; **Stella Cuthbert**, the Commissioner of the Illinois Department of Employment Security; **Lynn Martin**, the Secretary of the United States Department of Labor; **Roberts T. Jones**, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and **the United States Department of Labor**,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT

In our Petition for Writ of Certiorari ("Pet."), we asked this Court to hear three questions. Pet. at i. We argued, among other things, that review was justified because the ruling below presented this Court with an opportunity to resolve two separate conflicts among the courts of appeal and because it decided an important question of constitutional law in a way that conflicts with applicable decisions of this Court. Pet. at 22-31.

In their Brief in Opposition to Petition for Writ of Certiorari ("Op. Cert."), the respondent state officials,[1]

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[1] The respondent state officials are Loleta Didrickson, the Director of the Illinois Department of Employment Security ("IDES") and Stella Cuthbert, the Commissioner of IDES.

The United States Department of Labor and certain of its officials are parties to this case, too. See Pet. at iv-v. By letter of November 7, 1991, however, all the federal parties notified the Court that they did not intend to file any response to the petition unless directed to

(continued...)

do not contend that the questions we present are unimportant or are, for this reason, unworthy of this Court's attention. Nor do they contest the existence of the conflicts that we describe. And they do not even cite the several decisions of this Court that we discuss in urging that the ruling below decided a "federal question in a way that conflicts with the applicable decisions of this Court." Sup. Ct. R. 10.1(c).

Instead, the respondents argue that the court of appeals' decision was correctly decided. To make that argument, however, they ignore critical aspects of the statutory framework that governs the funding of the two unemployment insurance programs at issue, and mischaracterize both the nature of that funding and our argument.

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[1](...continued)
do so by the Court. Therefore, when we refer to "respondents" in this reply, we mean to designate the respondent state officials only.

1. Respondents repeatedly characterize the funds used to pay extended benefits ("EB") and federal supplemental compensation ("FSC") as "state moneys." Op. Cert. at 1, 3,7,9. They never define the term "state moneys," but their contention clearly is that if EB and FSC benefits are paid from "state" funds, that fact, of itself, establishes that the court of appeals' decision is correct.

We acknowledge that this Court's decisions establish that the Eleventh Amendment offers state officials immunity against suits seeking a judgment that would be paid from the state's general revenues. See Pet. at 32-34. We argue, however, that the Eleventh Amendment offers no immunity to state officials against suits seeking judgments payable from funds that are either segregated by law from a state's general revenues or drawn entirely from federal funds. Pet. at 22-27. And we argue further

that the EB and FSC benefits here fall into those special categories of "funds." Pet. at 8-13.

The label "state moneys" is simply no answer to this latter argument, which calls for examination of the source of the unemployment compensation benefits in question. But respondents do not seriously press any other answer to it.

As a threshold matter, respondents do not at all contest that the funds used both to pay for the unemployment insurance benefits at issue and for administrative expenses to operate the relevant programs are segregated by law from Illinois' general revenues.

Respecting the issue of whether the unemployment funds are "state" funds at all, respondents completely ignore the fact that the federal government advances or reimburses 100% of the state's expenditure for FSC. Sections 603(a) and 604 of the

Federal Supplemental Compensation Act of 1982, 26 U.S.C. § 3304 (1988), note Pub. L. 97-248 (as amended) ("FSC Act") (App. 336, 338). The federal treasury also pays for one-half of EB. Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, 26 U.S.C. § 3304 (1988), note Pub. L. 91-373 (as amended) ("EUCA") (App. 306). Thus, all of respondents' arguments respecting the issue of whether "state" funds are at issue concern the funding for the half of EB that, like regular unemployment insurance benefits, is paid from the unemployment trust fund and not reimbursed by the federal government.

Even as to those funds, however, respondents ignore the fact that the trust fund is financed by the Federal Unemployment Insurance Tax Act, ("FUTA"), 26 U.S.C. §§ 3301 - 3306 (App. 216 - 398). Respondents argue that unemployment insurance benefits "are paid from moneys assessed and collected

from Illinois liable employers." Op. Cert. at 3. But Illinois collects unemployment insurance contributions from its employers because otherwise those employers would be subject to pay more FUTA tax. See 26 U.S.C. §§ 3302, 3303 (App. 216, 249).

Respondents concede that the contributions paid by Illinois' employers "pass through the unemployment trust fund." Op. Cert. at 3 (emphasis deleted). But they refuse to acknowledge that FUTA obligates Illinois to turn the contributions it collects over to the federal government, 26 U.S.C. § 3304(a)(3) (App. 266-267); see 42 U.S.C. § 503(a)(4) (App. 402), and that IDES may then requisition money from the unemployment trust fund "solely for payment of unemployment compensation" or related expenses. 26 U.S.C. § 3304(a)(4) (App. 267); 42 U.S.C. § 503(a)(5) (App. 402-404); Ill. Rev. Stat. ch. 48, ¶ 660 (App. 494-506).

In sum, not even respondents' characterization of the funds here as "state" moneys -- whether they are "state" moneys segregated by law from the state's general revenues quite aside -- withstands the analysis that accompanies scrutiny of the governing federal and state statutes.

2. Our petition presents this Court with an opportunity to resolve two conflicts among the courts of appeal. Pet. at 22-27. One conflict is whether the Eleventh Amendment bars a judgment against state officials for payment of public benefits which are paid entirely from federal funds. Id. at 22-23. The second is whether the Eleventh Amendment bars a judgment against state officials for public benefits which are paid from funds segregated by law from the state's general revenues. Id. at 24-27.

Respondents can hardly deny the existence of the two conflicts. Nor can they plausibly urge that the conflicts are

unimportant. First, the conflicts implicate decisions in 11 of the 12 courts of appeal. Second, questions about the scope of the immunity that state public welfare officials enjoy under the Eleventh Amendment are recurring ones that this Court has frequently addressed. See e.g. Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984), Edelman v. Jordan, 451 U.S. 651 (1974).

To rebuff our argument that the petition should be granted to resolve these circuit conflicts, respondents are reduced to the contention that the appellate rulings supporting petitioners' position are erroneous. See Op. Cert. at 8-10.[2] Sup. Ct. R. 10.1(a), however, suggests that, for this type of argument to carry the day, respondents must show that the these rulings are so clearly erroneous that the resulting conflicts are unworthy of resolution by this Court. Respondents do not even attempt to make that showing. Instead, they summarily dismiss those appellate decisions (from three circuits) that decline to extend the reach of the Eleventh Amendment to funds that are segregated by law from a state's general revenues as inconsistent with this Court's decisions in Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946) and Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944). See Op. Cert. at 8-9. As we explained in our petition, however,

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[2] Respondents also contend that those rulings that decline to extend the reach of the Eleventh Amendment to judgments that would be paid entirely from "federal funds" are inapplicable here, since the judgment here, including any EB and FSC benefits owing, would be paid from "state funds." Op. Cert. Br. at 9. That argument, however, falls with its premise: as we (continued...)

[2](...continued) explained in our petition at 8-13 no benefits owed as the result of any judgment here would be paid from the state's general revenues, but instead from federal funds segregated from the state's general revenues.

Kennecott Copper Corp. and Read were taxpayer suits for the refund of tax payments that, unlike the unemployment compensation funds here, were, by law, not permanently segregated from the state's general revenues. Kennecott Copper Corp., 327 U.S. at 576 & n. 2; Read, 322 U.S. at 48-49. To the contrary, the funds in each of those cases were separated from the state's general revenues only until a final determination on the merits of the suits, and were paid into the state's general revenue fund if the imposition of the tax was upheld. Id. These cases are, therefore, wholly consistent with the appellate court rulings on which we rely -- and offer no support for those on which respondents rely.

Respondents also attempt to dismiss those appellate decisions (from four circuits) that uphold judgments against state welfare officials administering wholly federal funds as inconsistent with the "key

point" that, under this Court's decisions, the Eeventh Amendment bars "any judgment" against state officials. Op. Cert. at 9. But numerous decisions of this Court squarely contradict the notion that the Eleventh Amendment bars "any judgment" against state officials or even "any judgment" requiring the expenditure of state funds. See e.g. Pennsylvania v. Union Gas Co. 491 U.S. 1 (1989), Missouri v. Jenkins, 491 U.S. 274 (1989), Milliken v. Bradley, 433 U.S. 267 (1977). Respondents' contrary understanding, under which the simple identification of the named defendants from the caption of the case would virtually end the constitutional analysis, trivializes the "fundamental principle[s]" the Eleventh Amendment incorporates. Welch v. Texas Department of Highways and Public Transportation, 483 U.S. 468, 486 (1987).

3. In our petition, we also argued that the Seventh Circuit's ruling was in

conflict with several of this Court's Eleventh Amendment decisions. Pet. at 27-31 (citing cases). That contention at least obliges respondents to explain that there is no conflict, or that any conflict that does exist is unworthy of resolution by this Court. See Sup. Ct. R. 10.1(c). They do not do so.

4. The third question presented in our petition is whether "Hans v. Lousiana, 134 U.S. 1 (1890) and the reach of the Eleventh Amendment ... should be confined to suits in which states or state officials are alleged to have violated state law, thereby limiting the jurisdictional bar against such suits in federal court to state law claims but preserving a common law sovereign immunity defense for states and their officials against federal claims." Pet. at i-ii.

Respondents say that, in presenting this question, petitioners are thereby seeking to

have this Court "overrule Hans...." Op. Cert. at 10. In our petition, however, we expressly disclaimed any such intention, explaining that "Hans ... [was] correctly decided...." Pet. at 35, see id. at 37-46. To be sure, petitioners do seek to confine Hans and the Eleventh Amendment to suits in which states or their officials are alleged to have violated state law; and that course would require this Court to overrule cases, decided after Hans, that held that the Eleventh Amendment immunized state officials from money judgments based on federal law claims. But Hans itself, and that part of its progeny in which plaintiffs presented what are now properly understood to be state law claims, would remain intact. See Pet. at 47-48. While the third question that petitioners present is, therefore, one that does seek reexamination of many of this Court's decisions, the reexamination sought

is not nearly as extensive as respondents suggest.

Respondents otherwise say nothing that effectively counters petitioners' explanation of why this Court should grant review of their third question (as well as the first two). See Pet. at 37-51. They say, for example, that "it is not clear that only state law claims are included within the immunity afforded by the Eleventh Amendment" (Op. Cert. at 10, emphasis in original) -- as if petitioners grounded their plea for review of the third question on the contention that this Court's decisions left it unclear whether the Eleventh Amendment reached federal claims. As we emphasized in our petition, however, this Court's decisions leave no doubt that the Eleventh Amendment, as this Court has interpreted it, does extend to such claims, though Hans itself did not require that interpretation. Pet. at 33-34, 37-39. Petitioners' plea for

consideration of the third question is grounded on a request that this Court reexamine those decisions.

Respondents' answer to petitioners' argument that "substantial incoherence attends Eleventh Amendment jurisprudence," Pet. at 42 (citing and discussing cases), is no more persuasive. They simply assert, without explanation, that there is "no incoherence." Op. Cert. at 11. And their reliance on the notion that the "'principle enunciated in Hans has been ... stable....'" (Op. Cert. at 11, quoting Welch) is no answer to the reasons that petitioners offer for reexamining one of the principles for which Hans has -- wrongly -- come to stand. See Pet. at 37-51.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

BONITA PASCHAL ET AL. *v.* LOLETA DIDRICKSON, DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91-577. Decided January 27, 1992

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the question whether the Eleventh Amendment bars a suit for retroactive monetary relief against a State, if recovery is sought from funds which are segregated from the general revenues or which come from the federal government. Two forms of unemployment benefits are at issue in this case. Both are paid from funds segregated from general state funds. One is wholly financed by the federal government. The Court of Appeals for the Seventh Circuit took the position that the source of state funds should be disregarded and declined to follow the "trust fund doctrine." 936 F.2d 940, 944 (CA7 1991). The Court held that a claim for retroactive monetary relief against the State was barred by the Eleventh Amendment, notwithstanding the segregation of funds and the fact of federal financing. *Id.*, at 945. In another case involving a suit seeking payment of unemployment benefits, the Court of Appeals for the Tenth Circuit has similarly rejected the view that a State's sovereign immunity may be abrogated where relief would be paid out of a special revenue fund. *Esparza* v. *Valdez*, 862 F.2d 788, 794 (CA10 1988). That Court held that, no matter what fund a judgment for past damages comes from, it is still a judgment against the State and as such is barred by the Eleventh Amendment. *Id.*, at 795.

Other Courts of Appeals have taken a contrary view of the effect of the Eleventh Amendment in similar circumstances. In *Brown* v. *Porcher*, the Court of Appeals for the Fourth Circuit held that a federal court could award a judgment against the South Carolina unemployment compensation fund, because that fund was segregated from general State revenues. 660 F.2d 1001 (CA4 1981), cert denied, 459 U.S. 1150 (White, Powell, and Rehnquist, JJ, dissenting). The Court of Appeals for the Third Circuit has held that a federal court could order retroactive relief against the Pennsylvania Department of Public Welfare (DPW), at least to the extent that the DPW would be reimbursed by the federal government. *Bennett* v. *White*, 865 F.2d 1395, 1408 (CA3), cert denied, 492 U.S. 920 (1989). In *Foggs* v. *Block*, the Court of Appeals for the First Circuit found that the Eleventh Amendment did not bar a federal court from ordering the restoration of food stamp benefits where the federal government bore the cost of the program. 722 F.2d 933, 941 n. 6 (CA1 1983), rev'd on other grounds sub nom. *Atkins* v. *Parker*, 472 U.S. 115 (1983).

The issue is important. I would grant certiorari to resolve this conflict among the Courts of Appeals.